Supreme Court, U.S.
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In The

Supreme Court of the United States

THE HONORABLE BOB SCHAFFER, CONGRESSMAN,

Petitioner,

v.

PAUL H. O'NEILL, SECRETARY OF THE UNITED STATES DEPARTMENT OF THE TREASURY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, upon receipt of an unconstitutional pay raise in violation of the Twenty-Seventh Amendment, a Member of Congress has suffered an injury-in-fact for Article III standing when:

   a. the pay raise threatens to damage his reputation?

   b. the pay raise directly affects his salary?

2. Whether the "case or controversy" provision of Article III may be interpreted so strictly that, by denying standing to all those who are affected most directly by an unconstitutional action by Congress, a provision of the Constitution is rendered unenforceable?

LIST OF PARTIES

The Honorable Bob Schaffer was a Plaintiff before the United States District Court for the District of Colorado, Appellant before the United States Court of Appeals for the Tenth Circuit, and is Petitioner before the United States Supreme Court. Congressman Bob Schaffer represents Colorado's Fourth Congressional District. He was first elected in 1996 and was reelected in 1998 and 2000. Congressman Schaffer is a resident of Fort Collins, Colorado.

Paul H. O'Neill is joined in his official capacity, and he, or his predecessor, was a Defendant before the United States District Court for the District of Colorado, Appellee before the United States Court of Appeals for the Tenth Circuit, and is Respondent before the United States Supreme Court.

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OPINIONS BELOW

Review is sought of an opinion of the U.S. Court of Appeals for the Tenth Circuit, *Schaffer v. Clinton*, 240 F.3d 878 (10th Cir. 2001), which held that Congressman Bob Schaffer lacked standing to challenge the Cost of Living Adjustment ("COLA") provision of the Ethics Reform Act of 1989 ("COLA Act") as a violation of the Twenty-Seventh Amendment, which requires an intervening election before any congressional pay raise may take effect. The Tenth Circuit opinion appears at pages App. 1-18 of the Appendix.

STATEMENT OF JURISDICTION

The Supreme Court of the United States has jurisdiction to hear this case under Article III of the United States Constitution and has the power to grant *certiorari* under 28 U.S.C. § 1254. The judgment sought to be reviewed was entered on February 13, 2001, by the U.S. Court of Appeals for the Tenth Circuit. On April 26, 2001, an application for extension of time to file a petition for *writ* of *certiorari* to the United States Court of Appeals for the Tenth Circuit was filed, which the Court granted until July 13, 2001.

CONSTITUTIONAL PROVISIONS INVOLVED

This Petition for *writ* of *certiorari* involves the Twenty-Seventh Amendment of the United States Constitution, App. 42, and Article III standing.

STATUTES INVOLVED

The following federal statutes are involved in this Petition for *writ* of *certiorari*: Ethics Reform Act of 1989, 2 U.S.C. § 31 (1989), App. 42, the Legislative Branch Appropriations Act, 5 U.S.C. § 5318 (1989), App. 46, and 5 U.S.C. § 5303 (1990), App. 43.

STATEMENT OF THE CASE

On January 29, 1999, Congressman Bob Schaffer, a member of the United States House of Representatives, filed suit against Robert E. Rubin, in his official capacity as Secretary of the Treasury.[1] Congressman Schaffer asserted that the automatic COLA provisions, 2 U.S.C. § 31 and 5 U.S.C. § 5318, violate the Twenty-Seventh Amendment of the United States Constitution and sought to bar the payment of any COLAs that did not comply with the intervening election requirement of the Twenty-Seventh Amendment.

[1] Walt Mueller, a Missouri State Senator; John Stoeffler, a United States taxpayer; and Gregory Watson, a United States taxpayer and National Coordinator of the Political Movement to ratify the Twenty-Seventh Amendment; were Plaintiffs at the District Court but were dismissed for lack of standing. *Schaffer v. Clinton*, 54 F. Supp.2d 1014, 1017-1018 (D. Colo. 1999), App. 22-24. That decision was not appealed. William Jefferson Clinton, President of the United States; Gary Sisco, Secretary of the U.S. Senate; and Robin H. Carle, Clerk of the U.S. House of Representatives; were Defendants at the District Court but were dismissed for lack of jurisdiction. *Id.* at 1019-1020, App. 28, 30. That decision was not appealed.

On July 2, 1999, after full briefing and oral argument, the District Court denied Congressman Schaffer's motion for summary judgment and granted Secretary Rubin's motion to dismiss. The District Court held that Congressman Schaffer had standing to challenge the constitutionality of the Ethics Reform Act of 1989 because the COLAs directly affect his salary. *Schaffer v. Clinton*, 54 F. Supp.2d 1014, 1018 (D. Colo. 1999), App. 24-25. Turning to the merits, the District Court held that the COLA provisions of the Ethics Reform Act of 1989 did not violate the Twenty-Seventh Amendment because they went into effect only after an intervening election of Representatives and because each individual COLA was not a "law" intended to be covered by the Twenty-Seventh Amendment. *Schaffer, id.*, at 1023-1024, App. 38.

Congressman Schaffer filed a timely Notice of Appeal to the U.S. Court of Appeals for the Tenth Circuit. On February 13, 2001, after briefing and oral arguments, the Tenth Circuit held that Congressman Schaffer lacked standing because he failed to prove that his claimed injury was personal, particularized, concrete and otherwise judicially cognizable. *Schaffer v. Clinton*, 240 F.3d 878, 886 (10th Cir. 2001), App. 17.

First, relying on *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 485-486 (1982), the Tenth Circuit held that Congressman Schaffer had not suffered an injury-in-fact because "the psychological consequence presumably produced by observation of conduct with which one disagrees . . . is not an injury sufficient to confer Art. III standing, even though the disagreement is phrased in

constitutional terms." *Schaffer*, 240 F.3d at 884, App. 12-13.

Second, the Tenth Circuit held that Congressman Schaffer's allegations that the COLAs were personally offensive and professionally harmful to him, as well as damaging to his political position and his credibility among his constituency, did not provide him with Article III standing due to the fact that he had not suffered a "palpable" or "real" injury by receiving an increase in pay because an increase in pay was not an injury but a benefit and because there was no "plausible benefit" that would inure to him should the Court decide in his favor. *Schaffer*, 240 F.3d at 884-885, App. 13-14.

Third, relying on *Department of Commerce v. United States House of Representatives*, 525 U.S. 316, 328-34 (1999), the Tenth Circuit held that Congressman Schaffer pointed to no concrete evidence that his political posture and credibility among his constituents had been damaged. *Schaffer*, 240 F.3d at 885, App. 15.

Finally, relying on *Raines v. Byrd*, 521 U.S. 811 (1997), the Tenth Circuit held that Congressman Schaffer did not have standing to challenge the constitutionality of the COLA Act because he had not alleged a sufficiently personal injury and because there had been no nullification of his ability to vote on the COLAs. *Schaffer*, 240 F.3d at 885-886, App. 15-16.

In reaching its holdings, the Tenth Circuit considered, but rejected, the holding of the D.C. Circuit in *Boehner v. Anderson*, 30 F.3d 156 (D.C. Cir. 1994), in which, on identical facts, the D.C. Circuit held that Members of Congress had suffered "distinct and palpable injur[ies]" sufficient

for standing to challenge the COLA Act. *Schaffer*, 240 F.3d at 886, App. 16-17.

This Petition for *writ* of *certiorari* follows.

STATEMENT OF THE FACTS

The Compensation Amendment[2] was originally proposed in 1789 by James Madison as the second of twelve amendments to the Constitution. *See* Richard B. Bernstein, *The Sleeper Wakes: The History and Legacy of the Twenty-Seventh Amendment*, 61 Fordham L.Rev. 497, 498 (1992). In 1791, the Commonwealth of Virginia became the eleventh of the fourteen states in existence at the time to ratify the third through the twelfth amendments, thereby adding those amendments to the Constitution as the Bill of Rights. The Compensation Amendment, however, was only adopted by six states and therefore did not become part of the Bill of Rights. *Id.*

In 1873, the State of Ohio adopted a resolution approving the Compensation Amendment in response to the "Salary Grab" Act of 1873, by which Congress had attempted to raise the salary of its members retroactively to the beginning of its current term in 1871. *Id.* at 534-537. Thereafter, the Compensation Amendment lay dormant and unnoticed until 1982, when Gregory Watson, then a student of economics at the University of Texas, discovered the unratified amendment during his search for a

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[2] This Petition refers to the Amendment at issue here as the "Compensation Amendment" in the period before its adoption and as the "Twenty-Seventh Amendment" after its ratification.

paper topic for a government class. When Watson concluded that the Compensation Amendment was still viable due to the fact that it contained no internal time limit, he set out on a quest to revive the Compensation Amendment. Watson began petitioning state legislators throughout the United States to work toward its ratification. The states of Maine and Colorado became the first to ratify the Amendment, in 1983 and 1984 respectively, in response to Mr. Watson's efforts. After Colorado's ratification, Mr. Watson discovered that Wyoming had ratified the Amendment in 1978 in response to a congressional pay increase passed in 1977. *Id.* at 534, 537.

Between 1984 and 1992, at least one state ratified the Amendment every year. On May 7, 1992, Michigan became the thirty-eighth state to ratify the Amendment, thus meeting the required three-fourths vote for the Amendment to become a part of the Constitution. Later in 1992, three more states voted to ratify the Amendment, bringing the total to forty-one.

On May 18, 1992, Archivist of the United States, Don W. Wilson, in compliance with his statutory duties, certified that the Twenty-Seventh Amendment had been ratified. Congress, under some confusion as to where the authority lay for the certification of amendments to the Constitution, nonetheless gave a quick endorsement of the Twenty-Seventh Amendment. On May 20, 1992, Congress confirmed the Archivist's decision by an overwhelming margin in both Houses.[3] *Id.* at 537-38, 542. At

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[3] The vote in the Senate was 99-0 and the vote in the House of Representatives was 414-3.

that point, the Twenty-Seventh Amendment became a part of the United States Constitution: "No law varying the compensation for the services of the Senators and Representatives, shall take effect until an election of Representatives shall have intervened." U.S. Const. amend. XXVII, App. 42.

On January 1, 1989, Congress passed the Ethics Reform Act of 1989, 2 U.S.C. § 31, App 42. The COLA Act gave each Representative an immediate one-time salary increase and, pursuant to an earlier federal law that applies to all federal employees, an annual cost of living adjustment (COLA) to salaries or pensions in subsequent years. 2 U.S.C. § 31(2); 5 U.S.C. § 5318, App. 42-43, 46. Originally, the COLA Act provided an exception to the salary adjustment process for United States Senators. However, Congress subsequently amended the COLA Act to remove this exception. 5 U.S.C. § 5318, App. 46.

The COLA Act provides that pay increases are to be paid automatically in accordance with the provisions of 5 U.S.C. § 5303, App. 43, which provides for annual adjustments in the pay of all federal employees based upon the fluctuation of the Employee Cost Index (ECI). In accordance with a 1985 federal law, the Bureau of Labor Statistics (BLS) calculates the ECI each October by comparing personnel costs for the last quarter of the preceding fiscal year with those for the last quarter of the current fiscal year. This amount, minus 0.5 percent, is the COLA pay raise to be received by Members of Congress, the President, the Vice President, Judges, and other high-level officials of all three branches of government. That pay raise is incorporated in an Executive Order of the President in December of each year, which puts the raise into

effect on January 1 of the following year. Ethics Reform Act § 704(a)(1)(B), 5 U.S.C. § 5318, App. 46. However, Members of Congress are limited to no more than 5 percent per year, regardless of the change in the ECI.

The annual pay increases occur by automatic operation of law, that is, Members of Congress receive a COLA without taking a vote and without an intervening congressional election as required by the Twenty-Seventh Amendment. 5 U.S.C. § 5303, App. 43. However, if the President decides that the COLA increase is inappropriate because of a national emergency or serious economic conditions affecting the general welfare, 5 U.S.C. § 5303(b)(1), App. 44, the President may prepare an alternative pay adjustment plan and submit it to Congress for approval. 5 U.S.C. § 5303(b)(1)(A), App. 44. Of course, Congress, acting on its own initiative, may enact legislation denying to its members the COLAs for any particular year.

By automatic operation of the COLA Act and without a vote by Congress followed by an intervening election of Congress, congressional salaries were increased on the first day of January 1992, 1993, 1998, and 2000. 5 U.S.C. § 5303, App. 43. In 1994, 1995, 1996, 1997, and 1999, Congress voted to deny its members the COLAs for those years. Pub. L. No. 103-6, 107 Stat. 35 (1993); Pub. L. No. 103-329, 108 Stat. 2382 (1994); Pub. L. No. 104-52, 109 Stat. 468 (1995); Pub. L. No. 104-208, 110 Stat. 3009 (1996); Pub. L. No. 105-277, 112 Stat. 2681 (1998). Congressman Schaffer was a recipient of an unwanted COLA in 1998 and 2000. 5 U.S.C. § 5303, App. 43.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE TENTH CIRCUIT IS IN CONFLICT WITH THE DECISIONS OF THIS COURT AND THE DECISION OF THE DISTRICT OF COLUMBIA CIRCUIT.

A. The Decision Of The Tenth Circuit Conflicts With The Decision Of This Court That The Threat Of Damage To An Elected Official's Personal, Political, Or Professional Reputation Is Sufficient To Provide Article III Standing.

1. Congressman Schaffer's personal, political, and professional reputation is threatened to be damaged in the manner held, in *Meese v. Keene*, 481 U.S. 465 (1987), to provide Article III standing.

In *Meese v. Keene*, 481 U.S. 465, 469 (1987), this Court held that a member of the California State Senate had standing to challenge the constitutionality of the Foreign Agents Registration Act of 1938 because compliance with the Act threatened to damage Keene's reputation. Keene wished to exhibit certain Canadian films concerning nuclear war and acid rain but was deterred from doing so because the films had been characterized as "political propaganda" under the Act. *Id.* at 468. Keene alleged that if he were to exhibit the films while they bore this characterization, "his personal, political, and professional reputation would suffer and his ability to obtain re-election and to practice his profession would be impaired." *Id.* at 473. Based on the affidavits submitted by Keene, this Court recognized that the suspicion that Keene alleged would be aroused against him as a result of the Act's characterization of the materials "would be a substantial

detriment to Keene's reputation and candidacy." *Id.* at 475. This Court held that this threat of damage to Keene's reputation constituted cognizable injury for standing purposes. *Id.* at 473. *See also, Miller v. Moore,* 169 F.3d 1119, 1122 (8th Cir. 1999) (threat of harm to State Senator's political career and livelihood, including his chances of reelection, conferred standing to challenge state constitutional amendment); *Irish Lesbian and Gay Organization v. Giuliani,* 143 F.3d 638, 650 (2nd Cir. 1998) (allegations of harm to organization's reputation sufficient to show standing); *Riggs v. City of Albuquerque,* 916 F.2d 582, 585 (10th Cir. 1990) (plaintiffs had standing where they alleged harm to their personal, political, and professional reputations).

Similarly, the threat of harm to Congressman Schaffer's personal, political, and professional reputation as a result of his receipt of the COLAs constitutes cognizable injury sufficient to sustain Article III standing. Congressman Schaffer has built his career and has a well-deserved reputation as a fiscal conservative. Therefore, his receipt of unconstitutional pay raises threatens to damage that reputation, as in *Meese,* by arousing public suspicion and influencing his constituency's view of him. *See, Meese,* 481 U.S. at 475. Under *Meese,* the threat of damage to Congressman Schaffer's personal, political, and professional reputation provides him with the requisite "distinct and palpable" injury necessary for standing. *Id.* at 472-473.

Furthermore, this Court held that although it was possible for Keene to minimize the risks of damage to his reputation by providing the viewers of the films with certain information, "the need to take such affirmative

steps to avoid the risk of harm to his reputation constitutes a cognizable injury in the course of his communication with the public." *Id.* at 475. Therefore, the Tenth Circuit's conclusion that "Congressman Schaffer can mitigate his injury by resorting to a self-help remedy — he can remit the portion of his pay he believes is unconstitutional to the Treasury," *Schaffer*, 240 F.3d at 885, App. 14 — demonstrates that Congressman Schaffer has suffered "a cognizable injury in the course of [such a] communication with the public." *See, Meese*, 481 U.S. at 475. Like Senator Keene in *Meese*, Congressman Schaffer "is not merely an undifferentiated bystander with claims indistinguishable from those of [others]; he would have to take affirmative steps . . . to prevent public formation of an association between [the unconstitutional pay raises he received] and his reputation." *Id.* at 476.

The Tenth Circuit's decision is therefore in conflict with the holding of this Court in *Meese*. This Court should grant *certiorari* to address this conflict.

2. Because the Tenth Circuit improperly interpreted Congressman Schaffer's injury to be "psychological" rather than an injury to his reputation, the Tenth Circuit's reliance on *Valley Forge* is in error.

The Tenth Circuit misinterpreted and misapplied the holding of *Valley Forge Christian College v. Americans United For Separation of Church and State, Inc.*, 454 U.S. 464 (1982), when it held that Congressman Schaffer had suffered what was tantamount to a "psychological" injury that, however profoundly felt, did not endow him with

standing to sue. *Schaffer*, 240 F.3d at 884, App. 12-13. Unlike the respondents in *Valley Forge Christian College* who were not directly affected by the governmental action to which they objected but were merely appalled and adamantly opposed to it, Congressman Schaffer is not relying on a "psychological" injury to provide him standing. Instead, his standing is based upon the fact that his personal, political, and professional reputation has been damaged as a direct result of his receipt of the unconstitutional COLAs.

The Tenth Circuit sought to undermine the Article III standing to which Congressman Schaffer was entitled as a result of his allegations of reputational and professional harm by asserting that there was a "lack of evidence" to support them. *Schaffer*, 240 F.3d at 885, App. 15. However, the Tenth Circuit was required to accept those allegations as true, as a factual matter, for purposes of the motion to dismiss under which Secretary O'Neill moved to challenge Congressman Schaffer's standing. *Williams v. Meese*, 926 F.2d 994, 997 (10th Cir. 1991); *see also, Miller*, 169 F.3d at 1122 (allegations of threat of harm to reputation taken as true to establish standing); *Irish Lesbian and Gay Organization*, 143 F.3d at 650 (same); *Riggs*, 916 F.2d at 585 (same).

Furthermore, the Tenth Circuit erred in its determination that an increase in pay could not cause injury to Congressman Schaffer, failing to accept as true Congressman Schaffer's assertions to the contrary. In doing so, the Tenth Circuit openly rejected not only the well-established standards for ruling on a motion to dismiss, but also the D.C. Circuit's proper application of those standards in *Boehner*: "We do not think it the office of a court

to insist that getting additional monetary compensation is a good when the recipient, a congressman, says that in his political position it is a bad." *Boehner*, 30 F.3d at 160; *see, Schaffer*, 240 F.3d at 885, 885 n. 7, App. 14.

At a later stage in the proceedings, evidence that Congressman Schaffer's reputation as a fiscal conservative was lowered in the estimation of his community, or that some people thought less of him or had changed their opinion of him in that regard, as a result of his receipt of the COLAs would establish damage to his reputation. *Zeran v. Diamond Broadcasting, Inc.*, 203 F.3d 714, 719 (10th Cir. 2000); *Dalbec v. Gentleman's Companion, Inc.*, 828 F.2d 921, 925 (2nd Cir. 1987). *See, Meese v. Keene*, 481 U.S. at 475 (allegations and uncontradicted affidavits established threat of damage to Keene's reputation and candidacy).

Moreover, although weighing of evidence is inappropriate at the motion to dismiss stage, Secretary O'Neill failed to provide any evidence to refute Congressman Schaffer's assertions that his receipt of unconstitutional COLAs threatens to damage his reputation. Secretary O'Neill argued, and the Tenth Circuit held, that Congressman Schaffer's reelection in 1998, after having received a COLA, was evidence that his reputation had not been damaged. *Schaffer*, 240 F.3d at 885, App. 15. However, the mere fact that Congressman Schaffer was reelected does not mean that his reputation as a fiscal conservative was not damaged or threatened to be damaged in the eyes of both Schaffer's constituents and the general public. He might well have been reelected notwithstanding such an injury to his reputation. Thus, the Tenth Circuit's reliance on Congressman Schaffer's

reelection falls short of establishing "beyond doubt that [Congressman Schaffer] can prove no set of facts in support of his claim which would entitle him to relief" for purposes of Secretary O'Neill's motion to dismiss. *See Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

Therefore, because Congressman Schaffer is not relying on a "psychological" injury for standing, but instead upon the threat to his personal, political, and professional reputation as a direct result of his receipt of the unconstitutional COLAs, *Valley Forge* is inapposite to this case. The Tenth Circuit's decision is therefore in conflict with the holding of this Court in *Valley Forge* and *Meese*. This Court should grant *certiorari* to address this conflict.

B. The Decision Of The Tenth Circuit Conflicts With The Decision Of The District Of Columbia Circuit That An Elected Official Whose Private Interest As An Employee Is Directly Affected By Changes To His Salary Has Article III Standing.

1. Congressman Schaffer's salary is directly affected in the manner held, in *Boehner v. Anderson*, 30 F.3d 156 (D.C. Cir. 1994), to provide Article III standing.

The D.C. Circuit held, in a case identical to the one presented to the Tenth Circuit, that Members of Congress have standing to challenge a pay raise awarded in violation of the Twenty-Seventh Amendment. *Boehner v. Anderson*, 30 F.3d 156 (D.C. Cir. 1994). Congressman John Boehner and twenty-seven other Members of Congress, 108 defeated congressional candidates, and 14 other individual organizations, filed suit against the Secretary of

the Senate, the Clerk of the House of Representatives, and the President of the United States challenging the COLA Act. The U.S. District Court for the District of Columbia granted Defendants' Motion for Summary Judgment. Boehner appealed. *Id.* at 156.

The D.C. Circuit held that a Member of Congress, as an employee of the United States Government, has standing to challenge the operation of a law that directly affects his rate of pay. *Id.* at 160. The Circuit Court held that an unconstitutional increase in pay for one year, or in the alternative for the next year, a decrease in pay, is a "distinct and palpable injury" to a Congressman in his capacity as an employee. *Id.* Then-judge Ruth Bader Ginsburg, writing for the Circuit Court, held that Congressman Boehner's claim "that the Ethics Reform Act unconstitutionally interferes with the amount and timing of his pay is a straightforward challenge to the constitutionality of a public law that directly affects his private interest as a government employee". *See id.* at 160.

The D.C. Circuit further held that because Congressman Boehner asserted an "individualized injury no different in kind from the injury that an unelected employee of the House might assert, and we surely would not remit such a plaintiff to the legislative process for redress," the Circuit Court refused to exercise its equitable discretion to dismiss the case as a matter more properly addressed by the legislative process. *Id.* at 161.

Instead of carefully relying on the persuasive precedent provided by the D.C. Circuit in *Boehner*, the Tenth Circuit openly rejected *Boehner*, holding that Congressman Schaffer lacked standing. *Schaffer*, 240 F.3d at 886,

App. 16-17. In fact, the Tenth Circuit never directly considered the D.C. Circuit's analysis of the fact that those challenging the COLA Act were directly affected because they were government employees. The Tenth Circuit merely "reject[ed]" the *Boehner* ruling as inconsistent with this Court's decision in *Raines v. Byrd*, 521 U.S. 811 (1997), and held that Congressman Schaffer could resort to the political process. *Schaffer*, 240 F.3d at 885-886, 885 n. 7, App. 14, 16-17. As a result of its ruling, the Tenth Circuit has created a conflict between it and the D.C. Circuit. This Court should grant *certiorari* to address that conflict.

2. The Tenth Circuit's reliance on *Raines* in its rejection of *Boehner* is in error.

a. This Court's holding in *Raines v. Byrd* did not address, let alone overrule, *Boehner v. Anderson*.

The Tenth Circuit erred in its use of *Raines* to reject the D.C. Circuit's holding in *Boehner*. For, in *Raines*, this Court simply did not address the situation in *Boehner*, where, as here, a member of Congress suffered a personal, individualized injury directly affecting both his private interest as a government employee, as well as his personal, political, and professional reputation. *See, Boehner*, 30 F.3d at 160-161. This Court, in fact, made no mention of *Boehner* in the *Raines* decision.

In *Raines*, the Members of Congress did not have a personal stake in the alleged dispute, but were, in this Court's view, merely objecting to the Line Item Veto Act because it represented a loss of political power by them. *Raines*, 521 U.S. at 821. In that case, the Members of

Congress had suffered no individualized harm to pay or reputation, but rather complained of a generalized institutional injury as a result of their loss of a vote. *Id.* at 824. This Court pointed out that the Members of Congress did not claim "that they have been deprived of something to which they *personally* are entitled." *Id.* at 821 (emphasis in original).

Unlike the Members of Congress in *Raines*, Congressman Schaffer claims that he has been "deprived of something to which [he] personally [is] entitled." *Id.* That is, Congressman Schaffer's standing lies, as in *Meese* and *Boehner*, in the threat of harm to his reputation and the impact on the amount and timing of his pay. *Meese*, 481 U.S. at 475; *Boehner*, 30 F.3d at 160. While the institutional injury in *Raines* was "wholly abstract and widely dispersed," *id.* at 829, Congressman Schaffer's injury is concrete and personal. Because *Raines* did not mention, let alone address, the situation of the individualized harms presented here and in *Meese* and *Boehner*, *Raines* provides no basis for the Tenth Circuit's rejection of *Boehner*.

In fact, the Eighth Circuit has so distinguished *Raines* in a case where, relying on *Meese*, standing was based on the threat to a state senator's reputation. *Miller*, 169 F.3d at 1122-1123. The Eighth Circuit held that *Raines* was "clearly distinguishable from the case before us" because, in *Raines*, this Court emphasized that the alleged injury was "merely an 'abstract dilution of institutional legislative power,' " whereas, in *Miller*, the threat to the senator's political career and livelihood was "precisely the type of individualized, concrete injury that the Supreme Court found lacking in *Raines*." *Id.* (quoting *Raines*, 521 U.S. at 826). Similarly, Congressman Schaffer's injury is

based not on an "abstract dilution of institutional legislative power," but rather on the "individualized, concrete injury" of the threat to his reputation and the impact on his pay; "[a]ccordingly, *Raines* has no application here." *Id.*

As a result, the decision of the Tenth Circuit is in conflict with the holding of this Court in *Raines*. *Certiorari* should be granted to address this conflict.

b. Congressman Schaffer meets the requirements of *Coleman v. Miller* as set forth in *Raines v. Byrd*.

The Tenth Circuit further erred in its analysis of the issue of vote nullification as set forth in *Raines* and *Coleman v. Miller*, 307 U.S. 433 (1939). Relying on *Raines v. Byrd*, 521 U.S. 811 (1997), the Tenth Circuit held that "there has been no nullification of Congressman Schaffer's ability to vote on the COLAs; if he received a COLA in 1998, that is simply because he 'lost that vote.' " *Schaffer*, 240 F.3d at 885 (quoting *Raines*, 521 U.S. at 824).

But contrary to the Tenth Circuit's statement, Congressman Schaffer did not have the ability to vote on the COLAs. That is, by operation of law, the law challenged by Congressman Schaffer, there was no vote for him to cast. Pursuant to the COLA Act, the pay raises unconstitutionally awarded to Congressman Schaffer in 1998 and 2000 went into effect automatically without any vote by Congress and without an intervening election of Congress. Because the Tenth Circuit is wrong regarding the manner in which Congressman Schaffer received the unconstitutional COLAs, its decision conflicts with the

decision of this Court in *Coleman v. Miller*, 307 U.S. 433 (1939). For Congressman Schaffer's inability to vote on the annual COLAs is akin to the vote nullification found by this Court in *Coleman*.

In fact, Congressman Schaffer's vote was nullified in an even more serious manner than occurred in *Coleman*. In *Raines*, this Court emphasized that the votes of the legislators in *Coleman* had been *"overridden* and *virtually held for naught."* *Raines*, 521 U.S. at 822-823 (quoting *Coleman*, 307 U.S. at 438) (emphasis added by Supreme Court in *Raines*). Although the votes of the State Senators in *Coleman* were nullified, at least those votes were allowed to be cast. *Raines*, 521 U.S. at 822. Here, no vote was taken. Congressman Schaffer therefore suffered a greater nullification of his vote than the legislators in *Coleman* because Congressman Schaffer was denied even the opportunity to vote on the COLAs.

In *Coleman*, this Court noted that the votes of the legislative plaintiffs "would have been sufficient [to prevail]," 307 U.S. at 438, and the *Raines* Court placed emphasis on that aspect of the *Coleman* decision. *Raines*, 521 U.S. at 823. However, that fact is irrelevant to the issue of vote nullification where, as here, there has been no vote, because, without a vote, it cannot even be known whether Congressman Schaffer would have been part of a voting bloc that would have been large enough to prevail against the awarding of the COLAs.

As explained in *Raines*, the *Coleman* Court held that the legislators had standing because "their votes have been completely nullified." *Id.* The *Coleman* legislators demonstrated vote nullification by showing that their

votes "would have been sufficient to defeat (or enact) a specific legislative act." *Id.* But this Court has never enunciated a requirement, in *Coleman* or elsewhere, that legislators must show that their votes would have been sufficient to prevail regarding a specific legislative act. The rule of *Coleman* is that when the votes of legislators have been completely nullified, the legislators have standing. Under *Coleman*, Members of Congress need only demonstrate that their constitutionally guaranteed votes have been "virtually held for naught" so as to support a claim of "a plain, direct and adequate interest in maintaining the effectiveness of their votes." *Coleman*, 307 U.S. at 438.

Therefore, because Congressman Schaffer was denied the opportunity to vote on the awarding of the COLAs entirely, thus "completely nullif[ying]" his vote and undermining his "plain, direct and adequate interest in maintaining the effectiveness of [his] vote," Congressman Schaffer has standing under *Coleman* and this Court's analysis of *Coleman* in *Raines* to challenge that nullification.

The Tenth Circuit's decision that there has been no nullification of Congressman Schaffer's vote is in conflict with the decisions of this Court in *Coleman* and *Raines*. *Certiorari* should be granted to address this conflict.

II. THIS CASE INVOLVES A MATTER OF EXCEPTIONAL NATIONAL IMPORTANCE BECAUSE THE DECISION OF THE TENTH CIRCUIT RENDERS THE TWENTY-SEVENTH AMENDMENT UNENFORCEABLE.

Although this Court has noted that the absence of possible plaintiffs is not, by itself, a reason to allow standing, *Valley Forge*, 454 U.S. at 489, some members of this Court have raised concerns that "the Court disregards its constitutional responsibility when, by failing to acknowledge the protections afforded by the Constitution, it uses standing to slam the courthouse door against plaintiffs who are entitled to full consideration of their claims on the merits." *Valley Forge*, 454 U.S. at 490 (Brennan, J., dissenting, joined by Marshall and Blackmun, JJ.) Legal scholars have raised the same concern. "It is [ ] a matter of some gravity if situations exist where the government, may, with impunity, violate the Constitution because no one is able to challenge the government's action in court." Donald L. Doernberg, *"We the People:" John Locke, Collective Constitutional Rights, and Standing to Challenge Government Action*, 73 Cal. L. Rev. 52, 83 (1985). This case is one of those "situations" because the Tenth Circuit recognized that, by denying standing to Congressman Schaffer, it was rendering the Twenty-Seventh Amendment unenforceable.[4]

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[4] In fact, Secretary O'Neill's counsel submitted supplemental authority in support of such a result. Letter dated November 15, 2000, from Department of Justice addressed to Patrick Fisher, Clerk, U.S. Court of Appeals for the Tenth Circuit.

This Court has expressed the view that, in certain circumstances in which no one has standing to sue, constitutional controversies should be left to the political process for resolution. *United States v. Richardson*, 418 U.S. 166, 179 (1974). The Tenth Circuit echoed that sentiment here. *Schaffer*, 240 F.3d at 885, App. 14. However, since *Marbury v. Madison*, 5 U.S. 137 (1803), the responsibility for ensuring that congressional and executive actions adhere to the commands of the Constitution has been lodged in the judiciary.[5] Doernberg, 73 Cal. L. Rev., at 101. In fact, this Court has continued to recognize that "the judiciary is clearly discernible as *the primary [and often, only] means through which [constitutional] rights may be enforced.*" *Davis v. Passman*, 442 U.S. 228, 241-242 (1979) (emphasis added).

Not surprisingly, therefore, legal scholars have pointed out that "[t]he Court's assertion [ ] that the judiciary must yield to the political process when certain constitutional questions arise is inconsistent with its own stated view of its role in the constitutional system." Doernberg, 73 Cal. L. Rev., at 102. Legal scholars continue to point out that the standing requirements judicially imported into the Constitution "often operate[ ] at cross purposes with the function of judicial review that the Court assumed in *Marbury v. Madison*." In fact, standing rules amount to the "partial overruling of *Marbury v. Madison* without any textual or structural warrant for that

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[5] Moreover, "[i]ssues of constitutionality and legality are not matters of majority vote." Richard A. Epstein, "Standing and Spending – The Role of Legal *and* Equitable Principles," 4 *Chapman L. Rev.* 1, 34 (2001).

reversal of policy." Richard A. Epstein, "Standing and Spending – The Role of Legal *and* Equitable Principles," 4 *Chapman L. Rev.* 1, 2, 60 (2001); *see also, id.* at 22, 36, 49. For the "central task of the courts in a system of judicial review is to make sure the legislature and the executive do not exceed their respective powers. That much is required by the rule of law." *Id.* at 60. Advocating a "revised standing doctrine" allowing basic constitutional challenges to government action, *id.* at 36, 51, Professor Epstein writes that in "the invocation of a convoluted doctrine of standing . . . lies perhaps the greatest irony about our level of collective trust in constitutional safeguards for the rule of law:"

> If no one has standing to call [the government] to account, it can disregard the law with impunity – a result that would 'make an ass of the law.' An efficient system of administrative law must find some answer to this problem, otherwise the rule of law breaks down.

Id. at 3 (quoting William Wade & Christopher Forsyth, *Administrative Law,* at 696 (7th ed. 1994)).

To remedy this abdication of judicial responsibility regarding its primary duty of protecting the Constitution, Justice Brennan implicitly suggested in *Valley Forge* that the standing doctrine should be modified when necessary to ensure that the judiciary could redress constitutional wrongs that would otherwise go uncorrected. Doernberg, 73 Cal. L. Rev., at 85 (citing *Valley Forge,* 454 U.S. at 507-509). Justice Brennan emphasized that the focus of standing should be the constitutional rights at stake:

> The Court waxes eloquent on the blend of prudential and constitutional considerations that combine to create our misguided "standing" jurisprudence. *But not one word is said about the [constitutional] right that the plaintiff seeks to enforce.* . . . [N]o judgment about standing should be made without a fundamental understanding of the rights at issue.

Valley Forge, 454 U.S. at 509 (Justice Brennan's emphasis).

For it is well-established that "a law repugnant to the Constitution is void and that courts, as well as other departments, are bound by that instrument." *Marbury*, 5 U.S. at 180. But no law will be judged repugnant to the Constitution, and hence void, unless that law may be presented for constitutional review to this Court. Otherwise, though repugant to the Constitution, it would be "void[able]" but never "void." Clearly, the "case and controversy" limitation of Article III does not override this fundamental aspect of the Constitution. *Valley Forge*, 454 U.S. at 493. For, "[w]hen the Constitution makes it clear that a particular person is to be protected from a particular form of government action, then that person has a 'right' to be free of that action; when that right is infringed, then there is injury, and a personal stake, within the meaning of Art. III." *Id.* at 493 n. 5. Therefore, "[t]o construe [ ] Article [III] to deny standing to the class for whose sake a constitutional protection is given simply turns the Constitution on its head." *Id.* (Brennan, J., dissenting) (internal citations omitted). Chief Justice Marshall went further, calling this Court's refusal to exercise power conferred on it by the Constitution "treason to the [C]onstitution." *Cohens v. Virginia*, 19 U.S. 264, 404 (1821).

The Tenth Circuit's holding that Congressman Schaffer lacks Article III standing leaves no possible plaintiff, thereby rendering the Twenty-Seventh Amendment unenforceable. This Court must not abdicate its judicial responsibility to ensure adherence by the Executive and Legislative branches to the Constitution and must, therefore, grant *certiorari* to determine whether, in this case, Article III standing rules should be permitted to render the Twenty-Seventh Amendment of the Constitution unenforceable.

CONCLUSION

For all the above reasons, Congressman Bob Schaffer respectfully requests that this Court grant this petition.

Respectfully submitted,

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APPENDIX

United States Court of Appeals, Tenth Circuit.

The Honorable Bob SCHAFFER, in his official capacity as a member of the United States House of Representatives; Walt Mueller, a Missouri State Senator; John R. Stoeffler, a United States taxpayer; Gregory D. Watson, a United States taxpayer and National Coordinator of the Political Movement to Ratify the 27th Amendment, Plaintiffs-Appellants,

v.

William Jefferson CLINTON, President of the United States of America, in his official capacity; Robert E. Rubin, Secretary of the Treasury, in his official capacity; Gary Sisco, Secretary of the United States Senate, in his official capacity; Jeff Trandahl, Clerk of the United States House of Representatives, in his official capacity, Defendants-Appellees.

No. 99-1385.

Feb. 13, 2001.

William Perry Pendley (D. Andrew Wight with him on the briefs), Mountain States Legal Foundation, Denver, CO, for the Plaintiffs-Appellants.

Kerry W. Kircher, Deputy General Counsel (Geraldine R. Gennet, General Counsel, with him on the brief), Office of the General Counsel U.S. House of Representatives, Washington, DC, for Defendant-Appellee Jeff Trandahl.

Douglas N. Letter, Appellate Litigation Counsel, United States Department of Justice (David W. Ogden, Acting Assistant Attorney General, United States Department of Justice, Patricia M. Bryan, Senate Legal Counsel,

Morgan J. Frankel, Deputy Senate Legal Counsel, Steven F. Huefner, Assistant Senate Legal Counsel and Allison Moore, Assistant Senate Legal Counsel, with him on the brief), Washington, DC, for Defendants-Appellees William Jefferson Clinton, Robert E. Rubin and Gary Sisco.

Before LUCERO, McKAY and MURPHY, Circuit Judges.

LUCERO, Circuit Judge.

Bob Schaffer, a United States Congressman, appeals[1] the district court's dismissal of a challenge, on Twenty-Seventh Amendment grounds, to the Cost of Living Adjustment ("COLA") provision of the Ethics Reform Act of 1989. Because we determine that appellant does not have standing to sue, we do not reach the merits of the appeal, namely, whether the district court erred in holding that the COLA provision of the Ethics Reform Act does not violate the Twenty-Seventh Amendment to the Constitution and that the COLA provision is not an unconstitutional delegation of Congress's legislative authority. Exercising jurisdiction pursuant to 28 U.S.C. § 1291, we affirm the judgment of the district court.

I

The Twenty-Seventh Amendment to the United States Constitution provides that "[n]o law, varying the

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[1] The other appellants in this case, who were dismissed for lack of standing, waived their arguments on appeal by failing to address the district court's ruling regarding their standing.

compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened." The so-called "compensation amendment" was originally proposed in the First Congress on June 8, 1789, by James Madison. *See* Richard B. Bernstein, *The Sleeper Wakes: The History and Legacy of the Twenty-Seventh Amendment*, 61 Fordham L.Rev. 497, 498 (1992). It was one of twelve proposed constitutional amendments, ten of which became the Bill of Rights. *See id.* at 530-32. Between 1789 and 1791, the amendment was ratified by six states and rejected by five and thus was not adopted. *See id.* In response to the "Salary Grab" Act of 1873, however, Ohio ratified the amendment in that year; after a congressional pay increase, Wyoming followed suit in 1978. *See id.* at 534, 537. Finally, as the result of the efforts of a self-financed campaign by one of the named parties in this case, Gregory D. Watson,[2] thirty-three additional states ratified the amendment between 1983 and 1992, after which Congress on May 20, 1992, approved the amendment as the

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[2] Watson, while a sophomore economics major at the University of Texas at Austin in 1982, wrote a paper on the compensation amendment, arguing that "the 1789 amendment was still validly before the states principally because, unlike most recent proposed amendments, it has no internal time limit." Richard B. Bernstein, *The Sleeper Wakes: The History and Legacy of the Twenty-Seventh Amendment*, 61 Fordham L.Rev. 497, 537 (1992). His paper urged that the amendment be ratified by the necessary number of remaining states and adopted. *See id.* "But Watson received only a 'C' from his instructor, who told him that the Amendment was a dead letter and never would become part of the Constitution." *Id.*

Twenty-Seventh Amendment to the Constitution. *See id.* at 537-38, 542.[3]

The Ethics Reform Act of 1989, Pub.L. No. 101-194, 103 Stat. 1716, established automatic annual COLAs pegged to the rate of change in the Employment Cost Index minus one-half of a percent.[4] The Act's COLA

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[3] Although appellees do not challenge its validity, there is a lively debate about the Twenty-Seventh Amendment's adoption and legitimacy because of the long period of time between the amendment's proposal in 1789 and its ratification by two-thirds of the states in 1992. *See, e.g.*, Stewart Dalzell & Eric J. Beste, *Is the Twenty-Seventh Amendment 200 Years Too Late?*, 62 Geo. Wash. L.Rev. 501 (1994); Sanford Levinson, *Authorizing Constitutional Text: On the Purported Twenty-Seventh Amendment*, 11 Const. Comment. 101 (1994); Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment*, 103 Yale L.J. 677 (1993); JoAnne D. Spotts, Note, *The Twenty Seventh Amendment: A Late Bloomer or a Dead Horse?*, 10 Ga. St. U.L.Rev. 337 (1994). Because the argument was not raised, it is not before this Court. *See Hernandez v. Starbuck*, 69 F.3d 1089, 1093 (10th Cir.1995).

[4] As codified, the Ethics Reform Act provides:

> (1) A provision of law increasing the rate of pay payable for an office or position within the purview of subparagraph (A), (B), (C), or (D) of section 356 of this title shall not take effect before the beginning of the Congress following the Congress during which such provision is enacted.
>
> (2) For purposes of this section, a provision of law enacted during the period beginning on the Tuesday following the first Monday of November of an even-numbered year of any Congress and ending at noon on the following January 3 shall be considered to have been enacted during the first session of the following Congress.

provision became effective on January 1, 1991, following an intervening election of Representatives.

Claiming the congressional COLA provisions of the Ethics Reform Act violate the Twenty-Seventh Amendment, four plaintiffs initiated this challenge: (1) Congressman Bob Schaffer, who represents a Colorado district in the House of Representatives; (2) Walt Mueller, who as "a Missouri State Senator . . . voted to adopt the 27th Amendment"; (3) Watson, a "United States taxpayer and National Coordinator of the Political Movement to Ratify the 27th Amendment"; and (4) John Stoeffler, "a United States taxpayer." (Appellants' App. at 10.) Congressman Schaffer, who has served in Congress since 1997, received a COLA in 1998 and 2000. He claims that these COLAs, as well as the 1992 and 1993 COLAs, are unconstitutional.

> (3) Nothing in this section shall be considered to apply with respect to any pay increase –
>
> (A) which takes effect under the preceding sections of this chapter;
>
> (B) which is based on a change in the Employment Cost Index (as determined under section 704(a)(1) of the Ethics Reform Act of 1989) or which is in lieu of any pay adjustment which might otherwise be made in a year based on a change in such index (as so determined); or
>
> (C) which takes effect under section 702 or 703 of the Ethics Reform Act of 1989.

2 U.S.C. § 364.

Although provisions of the Ethics Reform Act affect the salaries of federal judges, we can decide this appeal under the Rule of Necessity. *See United States v. Will*, 449 U.S. 200, 213-17, 101 S.Ct. 471, 66 L.Ed.2d 392 (1980).

In a memorandum opinion and order, the district court held that except for Congressman Schaffer the plaintiffs lacked standing to challenge the congressional COLA provisions of the Ethics Reform Act. Watson, Stoeffler, and Mueller did not have standing to sue as taxpayers because their case did not involve "acts of Congress under its taxing and spending authority when those acts implicate the Establishment Clause of the Constitution." *Shaffer v. Clinton,* 54 F.Supp.2d 1014, 1017 (D.Colo.1999) (citing *United States v. Richardson,* 418 U.S. 166, 94 S.Ct. 2940, 41 L.Ed.2d 678 (1974); *Flast v. Cohen,* 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968)). Furthermore, Mueller could not sue as a voter in congressional elections because his claim amounted to a "non-particularized constitutional violation." *Id.* at 1017. With respect to Congressman Schaffer, the district court noted that his salary was directly affected by the COLAs, but it did not expressly hold he had standing to sue. *Id.* at 1018.

In addition, the district court held that all of the defendants were improper parties because Congressman Schaffer's injury was not caused, and could not be resolved, by them. *Id.* at 1019-20. The court also determined that it lacked personal jurisdiction over the legislative branch defendants and that Colorado was not the proper venue. *See id.* at 1020-22.

On the merits, the court held that the COLAs did not violate the Twenty-Seventh Amendment because they went into effect after an intervening election of Representatives and that the COLAs were not independent laws under the Amendment because they are not discretionary acts of Congress. *See id.* at 1023-24. According to the court, the COLAs "accomplish[ ] the goal of the Founding

Fathers manifested in the Twenty-seventh Amendment" because they "eliminate[ ] the possibility that Congress will grant itself a new pay raise during its current session." *Id.* at 1024.

On appeal, appellants challenge only the district court's determination on the merits. We cannot proceed to the merits, however, without first deciding whether Congressman Schaffer had standing to sue.

II

The judicial power of federal courts extends only to actual cases and controversies. *See* U.S. Const. art. III, § 2; *Allen v. Wright*, 468 U.S. 737, 750, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984).

> [T]he "case or controversy" requirement defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded. The several doctrines that have grown up to elaborate that requirement are "founded in concern about the proper – and properly limited – role of the courts in democratic society."

Allen, 468 U.S. at 750, 104 S.Ct. 3315. Perhaps the most important of the several jurisdictional doctrines is that of standing. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 230, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990) ("The federal courts are under an independent obligation to examine their own jurisdiction, and standing 'is perhaps the most

important of [the jurisdictional] doctrines.' " (quoting *Allen*, 468 U.S. at 750, 104 S.Ct. 3315)).[5]

As is now well-settled, the elements of standing are three:

> "First, the plaintiff must have suffered an 'injury in fact' – an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of. . . . Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."

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[5] Admittedly, the standing doctrine is a confusing one. As the Supreme Court recognized in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 475, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982), We need not mince words when we say that the concept of "Art. III standing" has not been defined with complete consistency in all of the various cases decided by this Court which have discussed it, nor when we say that this very fact is probably proof that the concept cannot be reduced to a one-sentence or one-paragraph definition.

See also 13 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3531, at 347 (2d ed. 1984) ("However reassuring it may seem to describe the elements of standing in . . . brief phrases, the doctrines have changed continually in recent years. Even at any single moment, there are almost unlimited opportunities to disagree in applying the currently fashionable phrases. Several years ago, Justice Douglas observed that '[g]eneralizations about standing to sue are largely worthless as such.' " (quoting *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 151, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970))).

United States v. Hays, 515 U.S. 737, 742-43, 115 S.Ct. 2431, 132 L.Ed.2d 635 (1995) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (footnote, citations, and internal quotations omitted)) (further citations omitted). The standing inquiry must be "especially rigorous when reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." *Raines v. Byrd*, 521 U.S. 811, 819-20, 117 S.Ct. 2312, 138 L.Ed.2d 849 (1997).

> [T]he law of Art. III standing is built on a single basic idea – the idea of separation of powers. In the light of this overriding and time-honored concern about keeping the Judiciary's power within its proper constitutional sphere, we must put aside the natural urge to proceed directly to the merits of this important dispute and to "settle" it for the sake of convenience and efficiency. Instead, we must carefully inquire as to whether [plaintiffs] have met their burden of establishing that their claimed injury is personal, particularized, concrete, and otherwise judicially cognizable.

Id. at 820, 117 S.Ct. 2312 (internal quotation, citations, and footnote omitted).

In its starkest terms, the standing inquiry requires the Court to ask not only whether an injury has occurred, but whether the injury that has occurred may serve as the basis for a legal remedy in the federal courts.

> A federal court cannot pronounce any statute, either of a state or of the United States, void, because irreconcilable with the constitution,

> except as it is called upon to adjudge the legal rights of litigants in actual controversies. Have the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions? This is the gist of the question of standing. It is, of course, a question of federal law.

Baker v. Carr, 369 U.S. 186, 204, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962) (internal quotation and citation omitted). Although the standing question is often dressed in the dazzling robe of legal jargon, its essence is simple – what kind of injuries are courts empowered to remedy and what kind are they powerless to address? Our cold-eyed duty is to determine which category catalogs the present case. We start with Congressman Schaffer's representations about the injury he suffered.

The first element of the standing inquiry – whether Congressman Schaffer has suffered an injury in fact that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical – gives us pause. It is Congressman Schaffer's burden, as "the party who seeks the exercise of jurisdiction in his favor[,] clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute." *Hays*, 515 U.S. at 743, 115 S.Ct. 2431 (internal quotations and citations omitted). We "will not craft [his] arguments for him," *Perry v. Woodward*, 199 F.3d 1126, 1141 n. 13 (10th Cir.1999), *cert. denied*, 529 U.S. 1110, 120 S.Ct. 1964, 146 L.Ed.2d 796 (2000), and thus we evaluate only the basis for standing offered by Congressman Schaffer.

Congressman Schaffer asserts standing to bring the present action on the ground that "his salary as a Member of the House of Representatives is paid from the treasury in amounts unconstitutionally adjusted, which is personally offensive and professionally harmful to [him], as well as damaging to his political position and his credibility among his constituency." (Appellants' Reply Br. at 1.) We examine that claim in its several parts and as a whole to determine whether Congressman Schaffer has met his burden of demonstrating standing. *See Hays*, 515 U.S. at 743, 115 S.Ct. 2431.

The first portion of Congressman Schaffer's standing claim revolves around the asserted unconstitutionality of the congressional COLA provision. This argument is a statement of Congressman Schaffer's view of the merits of this case, and no more. The ultimate question of whether the congressional COLAs are unconstitutional is distinct from the antecedent issue of whether Congressman Schaffer has standing. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 66-67, 117 S.Ct. 1055, 137 L.Ed.2d 170 (1997) (noting that the question of standing "goes to the Article III jurisdiction of this Court and the courts below, not to the merits of the case"); *Cook v. Reno*, 74 F.3d 97, 99 (5th Cir.1996) ("[T]he ultimate merits of the suit are not a consideration when deciding standing."). We therefore turn to his allegations that the COLAs are "personally offensive and professionally harmful to [him], as well as damaging to his political position and his credibility among his constituency." (Appellants' Reply Br. at 1.)

A

Congressman Schaffer's allegation that the challenged COLAs are personally offensive to him does not establish his standing to sue. As the Supreme Court stated in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 485-86, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982), "the psychological consequence presumably produced by observation of conduct with which one disagrees . . . is not an injury sufficient to confer standing under Art. III, even though the disagreement is phrased in constitutional terms." *Valley Forge* involved a First Amendment challenge to the sale of government property to a self-professed Christian educational institution pursuant to a federal statutory scheme providing for the sale or lease of "surplus" government property to non-profit educational institutions. *Id.* at 466-68, 102 S.Ct. 752. Upon learning of the sale, the Americans United For the Separation of Church and State, Inc., and four of its employees brought a suit to enjoin the sale, claiming that each member of the organization "would be deprived of the fair and constitutional use of his (her) tax dollar for constitutional purposes in violation of his (her) rights under the First Amendment of the United States Constitution." *Id.* at 469, 102 S.Ct. 752. Relying on *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 94 S.Ct. 2925, 41 L.Ed.2d 706 (1974), and *United States v. Richardson*, 418 U.S. 166, 94 S.Ct. 2940, 41 L.Ed.2d 678 (1974), the Court held that the complaint failed to allege any consequences of the allegedly unconstitutional sale other than the psychological effects of that disagreement, and therefore that there was no "injury

sufficient to confer standing under Art. III." *Valley Forge*, 454 U.S. at 485, 102 S.Ct. 752.

As in *Valley Forge*, "[i]t is evident that [appellant is] firmly committed to the constitutional principle" embodied in the Twenty-Seventh Amendment, "but standing is not measured by the intensity of the litigant's interest or the fervor of his advocacy." *Id.* at 485-86, 102 S.Ct. 752. Thus, Congressman Schaffer's moral outrage, however profoundly and personally felt, does not endow him with standing to sue in the present action.[6]

B

As for his allegation that the challenged congressional COLAs are "professionally harmful" to him, Congressman Schaffer "complains of injury suffered in a personal capacity, caused by the fact that his employer pays him monies appropriated unconstitutionally from the Treasury." (Appellants' Reply Br. at 5.) The general notion that compensation of public officials has genuine constitutional significance and may furnish grounds for alleging an injury in fact is as old as the nation itself and precedes the ratification of the Twenty-Seventh Amendment. We respect Alexander Hamilton's cautionary words in The Federalist No. 79 that "[i]n the general course of human nature, a power over a man's subsistence amounts to a power over his will," but of course Hamilton was

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[6] We note that in *Valley Forge* the Supreme Court "[did] not retreat from [its] earlier holdings that standing may be predicated on noneconomic injury." *Valley Forge*, 454 U.S. at 486, 102 S.Ct. 752 (citations and footnote omitted).

speaking of a *decrease* in pay. We do not see how Congressman Schaffer could have suffered an injury in fact by receiving a nominal (though not, in economic terms, a real) *increase* in pay as a result of the 1998 COLA. Congressman Schaffer has not suffered "palpable injury" that is "real" in any meaningful sense of the term, and for standing purposes he has alleged no "plausible benefit" that would inure to him should we decide in his favor. *Ash Creek Mining Co. v. Lujan*, 969 F.2d 868, 875 (10th Cir.1992) (internal quotations omitted). Irrespective of the merits of the underlying cause of action, it is counterintuitive to claim "injury" by virtue of having received more than one's due.[7] To the extent he believes that he has been injured by receiving the COLA, Congressman Schaffer can mitigate his injury by resorting to a self-help remedy – he can remit the portion of his pay he believes is unconstitutional to the Treasury. As a member of Congress, he can work within the political system to press for repeal of the challenged COLA provision as has been done in the past. We hold that he was not injured for standing purposes simply because he received a higher salary.

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[7] The Court of Appeals for the District of Columbia Circuit reached a contrary conclusion in *Boehner v. Anderson*, 30 F.3d 156, 160 (D.C.Cir.1994). For the reasons discussed below, *see infra* Part II.C, we believe that *Boehner* is unsupported by the Supreme Court's standing jurisprudence, and we reject its analysis.

C

Congressman Schaffer also declares the COLAs to be "damaging to his political position and his credibility among his constituency." (Appellants' Reply Br. at 1.) However, he points to no concrete evidence of a loss of credibility or other reputational injury as a result of the COLAs, past or future. As appellees point out, he was reelected in 1998 after having received a COLA.[8] This is therefore not a case like *Department of Commerce v. United States House of Representatives*, 525 U.S. 316, 328-34, 119 S.Ct. 765, 142 L.Ed.2d 797 (1999), in which the plaintiffs established standing by presenting persuasive statistical evidence demonstrating the dilution of their political influence (i.e., the power of their votes) resulting from the likely loss of congressional districts in their states.

Rather, this case is much closer to *Raines*, in which the Court held that members of Congress lacked standing to challenge the statute creating the line-item veto. Like the plaintiffs in *Raines*, Congressman Schaffer has not alleged a sufficiently personal injury to establish standing

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[8] In fact, Congressman Schaffer was elected to a third term shortly before oral argument in this case. We take judicial notice of the fact that his percentage of the vote has increased each time he has run for reelection. When first elected to Congress in 1996, he won with 56% of the vote. *See The Political Reference Almanac* (Anthony Quain, ed., 1999-2000 ed.), *available at* http://www.polisci.com/almanac/legis/district/CO04.htm. In 1998, he won reelection with 60% of the vote. *Id.* Most recently, Congressman Schaffer ran unopposed by a major party candidate and garnered nearly 80% of the votes cast. *See* Colorado Secretary of State, *November 7, 2000 Colorado General Election Results Final Certified Official, at* http://www.sos.state.co.us/pubs/elections/elec___night.html (Jan. 4, 2001).

because he "ha[s] not been singled out for specially unfavorable treatment as opposed to other Members" of the House of Representatives. 521 U.S. at 821, 117 S.Ct. 2312. Instead the COLAs, which apply to every Representative, "necessarily damage [ ] all Members of Congress . . . equally." *Id.* Congressman Schaffer's allegations of harm to his political position and his credibility among his constituency are even more abstract than the assertion of a "dilution of institutional legislative power" the Court found wanting in *Raines*. *Id.* at 826, 117 S.Ct. 2312; *see also id.* at 821, 117 S.Ct. 2312 (noting that a "claim of standing . . . based on a loss of political power," unlike the loss of a private right, is insufficiently concrete). Finally, as in *Raines*, there has been no nullification of Congressman Schaffer's ability to vote on the COLAs; if he received a COLA in 1998, that is simply because he "lost that vote." *Id.* at 824, 117 S.Ct. 2312. The Ethics Reform Act has no effect on either Congressman Schaffer's ability to press for a change in the law setting Representatives' salaries or for Congress to amend the COLA provisions pursuant to the normal legislative process. *See id.*

Congressman Schaffer relies heavily on *Boehner v. Anderson*, 30 F.3d 156 (D.C.Cir.1994), which involved a similar challenge to the COLA provision of the Ethics Reform Act brought by a member of Congress. *Boehner* concluded that a Congressman, who "by virtue of that office . . . is also an employee of the United States Government[,] . . . clearly has standing to challenge the operation of a law that directly determines his rate of pay" because such a claim "alleges a 'distinct and palpable injury' to him in his capacity as an employee." *Id.* at 160. This holding relies on no Supreme Court precedent

and precedes *Raines*. We find the cursory discussion in *Boehner* unpersuasive and contrary to recent Supreme Court law and thus reject its standing analysis.

We note that, as in *Raines*, "our conclusion neither deprives Members of Congress of an adequate remedy (since they may repeal the Act [or vote to refuse the COLAs]), nor forecloses the Act from constitutional challenge (by someone who suffers judicially cognizable injury as a result of the Act)."[9] 521 U.S. at 829, 117 S.Ct. 2312. Congressman Schaffer himself, however, has failed to carry his burden of showing his "claimed injury is personal, particularized, concrete, and otherwise judicially cognizable." *Id.* at 820, 117 S.Ct. 2312.[10]

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[9] At oral argument, defendants asserted that none of the parties was responsible for paying congressional salaries. Thus, we do not consider the broader question of whether the refusal by a disbursing officer to pay the legislative COLAs on the claimed basis that it would be unconstitutional to do so could lead to a different result.

[10] As a theoretical matter, it may make sense for plaintiffs like Congressman Schaffer to be granted standing to challenge the unconstitutionality of particular acts of Congress; as the Supreme Court pointed out in *Raines*, "some European constitutional courts operate under one or another variant of such a regime [regarding who may bring suit to enforce the constitution]." 521 U.S. at 828, 117 S.Ct. 2312 (citing authorities). "But it is obviously not the regime that has obtained under our Constitution to date" due to Supreme Court doctrine establishing a "more restricted role of Article III courts." *Id.* (citing *United States v. Richardson*, 418 U.S. 166, 192, 94 S.Ct. 2940, 41 L.Ed.2d 678 (1974)) (Powell, J., concurring).

III

Because Congressman Schaffer lacks standing, we **AFFIRM** the district court's dismissal of this case, albeit on different grounds from those articulated by the district court. *See United States v. Sandoval*, 29 F.3d 537, 542 n. 6 (10th Cir.1994) ("We are free to affirm a district court decision on any grounds for which there is a record sufficient to permit conclusions of law, even grounds not relied upon by the district court." (quotations and citations omitted)).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 99-K-201

THE HONORABLE BOB SCHAEFFER, in his official capacity as a member of the United States House of Representatives; WALT MUELLER, a Missouri State Senator; JOHN R. STOEFFLER, a United States taxpayer; and GREGORY D. WATSON, a United States taxpayer and National Coordinator of the Political Movement to Ratify the 27th Amendment,

Plaintiffs,

v.

WILLIAM JEFFERSON CLINTON, President of the United States of America, in his official capacity; ROBERT E. RUBIN, Secretary of the Treasury, in his official capacity; GARY SISCO, Secretary of the United States Senate, in his official capacity; and JEFF TRANDAHL, Clerk of the United States House of Representatives, in his official capacity,

Defendants.

MEMORANDUM OPINION AND ORDER

(Filed Jul. 2, 1999)

KANE, J.

The complaint alleges annual cost of living adjustments (COLAs) to salaries of members of Congress violate the Twenty-seventh Amendment to the Constitution of the United States. The COLAs are applied to congressional pay in accordance with the Ethics Reform Act of 1989, Pub. L. No. 101-194, 103 Stat. 1716 (1989), codified

at 2 U.S.C. § 31(2). The Twenty-seventh Amendment provides, in its entirety: "No law varying the compensation for the services of the Senators and Representatives shall take effect until an election of Representatives shall have intervened." U.S. CONST. amend. XXVII. Plaintiffs contend each COLA is an independent law that violates the Constitution. Defendants move to dismiss, arguing that plaintiffs lack standing, this court has no jurisdiction, venue is incorrect, the defendants are improper, the case is not ripe, and plaintiffs fail to state a claim upon which relief may be granted.

Simultaneous with the filing of their opposition to the motions to dismiss, plaintiffs filed an Alternative Motion for Summary Judgment, asserting there is no genuine issue as to any material fact remaining in dispute and plaintiffs are entitled to judgment as a matter of law. A number of the "facts" listed by plaintiffs as not in dispute are legal conclusions and this case is appropriately disposed of at this juncture based upon the arguments in the motion to dismiss. I grant defendants' motion to dismiss and deny plaintiffs' alternative motion for Summary judgment.

I. STANDING

Four plaintiffs filed the complaint. One plaintiff (Schaeffer) represents Colorado in the United States House of Representatives. Another plaintiff (Mueller) is a state senator from Missouri who voted, as a member of the Missouri State Legislature, to ratify the Twenty-seventh

Amendment. The remaining two plaintiffs (Watson and Stoeffler) are listed as "taxpayers." (complaint at 2.)[1]

Defendants' motions to dismiss argue Mueller, Watson, and Stoeffler have no standing to sue. In order to establish standing, plaintiffs must demonstrate 1) they have suffered a concrete and particularized injury in fact, 2) traceable to the defendants' act(s), and 3) likely to be redressed by a favorable decision by the court. *Bennett v. Spear*, 520 U.S. 154, 167 (1997); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The standing examination is "especially rigorous" when the court is asked to decide on the constitutionality of action taken by another branch of the federal government. *Raines v. Byrd*, 521 U.S. 811, 117 S.Ct. 2312, 2317-18 (1997).

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[1] Plaintiff Watson was the strongest force in the revival and eventual movement to ratify the amendment. In 1982, while performing research for a paper in a government class at the University of Texas, Watson discovered that the compensation amendment, proposed in 1789 with the Bill of Rights, lay dormant but still potent. Watson wrote a paper, *Can an Amendment To The United States Constitution Proposed By Congress In 1789, Which Has Never Been Ratified, Still Be Ratified – Even After All These Years*? Despite the profuse title, Watson received a grade of "C" on his paper. Undaunted by his professor's criticism, Watson undertook a self-financed, ten-year crusade to influence state legislatures to consider and ratify the Madison amendment. His eventual success was noted on May 18, 1992, when the Archivist of the United States ruled the Twenty-seventh Amendment ratified. Richard B. Bernstein, *The Sleeper Wakes: The History and Legacy of the Twenty-seventh Amendment*, 61 Fordham L. Rev 497, 539-540 (1992). One wonders what a student of Watson's professor would need to do to get an "A."

A. INJURY IN FACT

1. Taxpayer plaintiffs (Watson, Stoeffler)

Two of the plaintiffs claim standing to sue on the basis of their status as United States taxpayers. They state taxpayers have standing to sue when "congressional action under the taxing and spending clause is in derogation of the constitutional provisions which operate to restrict the exercise of the taxing and spending power." *Flast v. Cohen*, 392 U.S. 83, 102-3 (1968).

Generally, a federal taxpayer who asserts generalized grievances rather than claiming "he has sustained or is in immediate danger of sustaining some direct injury," has no standing to sue. *Frothingham v. Mellon*, 262 U.S. 447, 488 (1923). The *Flast* decision carved out exceptions to the prohibition against federal taxpayer standing, allowing taxpayer challenges to congressional action under the Taxing and Spending Clause of Article I, Section 8 of the Constitution. The Court later clarified the issue of taxpayer standing by noting that taxpayers may claim standing only in cases involving acts of Congress under its taxing and spending authority when those acts implicate the Establishment Clause of the Constitution. *See United States v. Richardson*, 418 U.S. 166 (1974) (*cited in Colorado Taxpayers Union v. Romer*, 963 F.2d 1394, 1399 (10th Cir. 1992)).

In this case, the taxpayers have no apparent standing to sue for two reasons. first, congressional pay increases under the Ethics Reform Act have nothing to do with the Establishment Clause. Second, Congress' authority to adjust compensation of its members is derived not from

the Taxing and Spending Clause, but from the Ascertainment Clause of the Constitution. *Richardson v. Kennedy*, 313 F.Supp. 1282, 1285-86 (W.D. Pa. 1970). Plaintiffs' challenge involves matters outside the Establishment Clause under congressional Ascertainment Clause authority. The taxpayer plaintiffs have no standing to sue.

2. State legislator (Mueller)

Senator Mueller claims he has standing to sue as a taxpayer and as a member of a state legislative body that voted to ratify the Twenty-seventh Amendment. As the previous section indicates, this plaintiff has no standing to sue as a federal taxpayer. Plaintiffs argue that Senator Mueller, as a voter in congressional elections, has been denied his ability to vote based on how his representative in Congress voted on congressional pay increases. They cite no authority for their proposition that prospective voters in congressional elections have standing to sue. The generalized nature of an injury to a voter is similar to that of the taxpayer described above. As a voter, Senator Mueller does not claim a direct, particularized injury. Citizens have no standing to sue to enforce non-particularized constitutional violations. *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 220 (1974).

A legislator's interest in the enforcement of a law is indistinguishable from that of any other member of the public. *Daughtrey* [sic] *v. Carter* 584 F.2d 1050, 1057 (D.C. Cir. 1978). Senator Mueller's vote to ratify the Twenty-seventh Amendment did not change his position with regard to standing. Once the Twenty-seventh Amendment became part of the Constitution, any failure to

enforce or follow the Amendment affects Senator Mueller in the same generalized way it affects any member of the public. Because members of the public have no standing to file suit based on generalized grievances, Senator Mueller has no standing in this case.

3. U.S. Congressman (Schaeffer)

Congressman Schaeffer's claim is based on an assertion that his political position with his constituency is damaged by automatic annual increases to his compensation. Because automatic COLAs have a direct and specific effect on congressional salaries, a congressman's right to sue is not limited by the *Forthingham* and *Schlesinger* standards.

In a case substantially similar to the instant case, a United States congressman was held to have standing in challenging the annual COLAs to his compensation. *See Boehner v. Anderson*, 30 F.3d 156, 160 (D.C. Cir. 1994). Then-judge, now Justice Ruth Bader Ginsburg, writing for the court of appeals in *Boehner*, addressed the issue of whether it was proper for a court to rule on a congressman's contention that an increase in his pay constitutes a harm to his political position. She deferred to the congressman's opinion that his increased salary was a distinct and palpable injury. *Id.*

Defendant Trandahl distinguishes *Boehner*, arguing that Schaeffer does not trace an injury to a specific COLA, while Boehner claimed that a specific COLA, the 1993 adjustment, violated the Twenty-seventh Amendment. Plaintiffs counter by claiming that three COLAs have violated the Twenty-seventh Amendment: 1992, 1993, and

1998. I note the first of these, in 1992, preceded the ratification of the Twenty-seventh Amendment.

B. EQUITABLE DISCRETION

Executive branch defendants argue I should exercise equitable discretior not to hear the case. Because Congress must approve each proposed COLA in order to modify congressional salaries, Congressman Schaeffer can obtain relief through the use of the legislative process. Congressman Schaeffer claims his injury arises from increases to his compensation as a member of Congress. Congressman Schaeffer is free to persuade his congressional colleagues not to approve the COLAs. He has an internal remedy available through the legislative process.

Executive defendants assert, even if Congressman Schaeffer has standing, I should not hear the lawsuit. "[I]f a legislator could obtain substantial relief from his fellow legislators through the legislative process itself, then it is an abuse of discretion for a court to entertain the legislator's action." *Melcher v. Federal Open Market Committee*, 836 F.2d 561, 565 (D.C. Cir. 1987). The D.C. Circuit echoed the same tone in 1988, but not without noting that this use of equitable discretion had not been considered by the Supreme court, or, for that matter, by circuits other than the D.C. Circuit Court of Appeals. *Humphrey v. Baker*, 848 F.2d 211, 214 (D.C. Cir. 1988). Even within the D.C. Circuit, treatment of equitable discretion does not enjoy unanimous acceptance. *Id.* I reject it as an aberrant use of the concept of discretion.

Deference to legislative authority was restated, without using the term "equitable discretion," by the United

States Supreme Court in *Raines v. Byrd*, 528 U.S. 811, 117 S.Ct. 2312, 2320-22 (1997). There, the Court found members of Congress did not have standing to challenge the Line Item Veto Act. The existence of an internal remedy – Congress' legislative authority to repeal the legislation – meant the plaintiff members of congress had not suffered individual injuries through the enactment of a law that altered and violated the constitutional budgetary process. The same could be said for Congressman Schaeffer. An internal remedy of legislative action to repeal the Ethics Reform Act of 1989 is available. The existence of such remedy may properly restrict a court from hearing the case. Congressman Schaeffer's claimed injury, though, is more particularized than that of the congressional plaintiffs in *Raines*. The violation of the Constitution claimed by Schaeffer directly affects his salary, where the *Raines* defendants' constitutional challenge was a generalized complaint that the Line Item Veto offended the constitutionally prescribed budgetary process.

C. CAUSATION / REDRESSABILITY / PROPER PARTIES

The second requirement for standing is causation. To establish standing, the plaintiffs must show the injury is traceable to the defendants' acts. *Bennett v. Spear*, 520 U.S. at 167. Defendants raise various independent arguments that they have done nothing to injure the plaintiffs. The third element is redressability: the plaintiff must show the injury could be cured by a favorable decision by the

court. The issues of causation and redressability are intertwined in this discussion with that of whether the defendants are proper parties to the suit. Each defendant argues, even if congressman Schaeffer were injured, the injury cannot be traced to or resolved by that defendant.

1. Defendant Trandahl – Clerk of the U.S. House of Representatives

The complaint, dated January 29, 1999, names Robin H. Carle, Clerk of the House of Representatives, as a defendant. Ms. Carle resigned from that position effective January 1, 1999, and was replaced by Jeff Trandahl on January 6, 1999. In the March 19, 1999 Entry of Appearance of counsel for defendant Carle, the House counsel suggested Trandahl for Carle as a named defendant. On March 23rd, this court ordered the substitution as proposed by House counsel.

Trandahl argues his official duties as House Clerk do not include disbursement of the payment of salaries to House members. He claims those duties are the responsibility of the Chief Administrative Officer of the House. Trandahl cites 2 U.S.C. § 80, which states:

> The moneys which have been, or may be, appropriated for the compensation and mileage of Members and Delegates shall be paid at the Treasury on requisitions drawn by the Chief Administrative Officer of the House of Representatives, and shall be kept, disbursed, and accounted for by him according to law, and he shall be a disbursing officer, but he shall not be entitled to any compensation additional to the salary fixed by law.

Plaintiffs maintain the Clerk of the House is the proper party because the clerk is "responsible for all personnel who distribute salaries and pensions to Members of the House. . . . " In a subsequent memorandum, plaintiffs request the opportunity to amend their complaint, if the court agrees that Trandahl is not a proper party, to substitute the "specific official or officials working under Mr. Trandahl who are the proper parties." It is unclear whether the Chief Administrative Officer of the House works "under Mr. Trandahl." Trandahl himself, though, did not cause and cannot redress the injury alleged by Congressman Schaeffer. Trandahl is an improper party to this action.

2. Executive Branch Defendants – President Clinton and Secretary of the Treasury Robert Rubin

The complaint names President Clinton in his capacity as "Chief Executive of all individuals in the Executive Branch who have the authority to pay pension. . . . " (Complaint at 2.) The complaint also names the Secretary of the Treasury as he is "responsible for the paying of all monies as established by the Secretary of the United States Senate and Clerk of the United States House of Representatives." (*Id.*)

If the extent of the president's responsibility in this case is his role in the payment of pensions to retired congressmen and their spouses, the president has not injured the plaintiffs and should not be a party to this suit. The Twenty-seventh Amendment does not deal with congressional pensions. Plaintiffs cite no authority that

indicates congressional pensions fall under the Twenty-seventh Amendment or the Ethics Reform Act of 1989. Congressman Schaeffer is not receiving, nor eligible to receive, a congressional pension at this time. He cannot and does not claim a personal, direct injury as the result of payments of congressional pensions. Any claim Congressman Schaeffer makes on the basis of his future pension benefits is not ripe because it does not represent a present or imminent injury. *See New Mexicans for Bill Richardson v. Gonzales*, 64 F.3d 1495, 1499 (10th Cir. 1995).

The executive defendants argue they are included for activity that is purely ministerial and cite a Vermont district court ruling that a government official whose role in a case was entirely ministerial was not a proper party to the suit. *See Goulet v. Schweiker*, 557 F.Supp 1250, 1260-61 (D. Vt. 1983). The executive defendants also note the court may not enjoin a president from the performance of his official duties. *See Franklin v. Massachusetts*, 505 U.S. 708, 802 (1992).

3. Defendant Sisco, Secretary of the United States Senate

The Secretary of the Senate argues any injury suffered by Congressman Scaheffer cannot be traced to the Secretary of the Senate. Congressman Schaeffer is not a member of the United States Senate. His salary is not calculated or paid by the Senate. The Secretary of the Senate plays no role in the payment of salaries to members of the House of Representatives. Schaeffer claims an injury in the form of COLAs to his House salary. The Secretary of the Senate was not involved in any aspect of

determining, calculating, or paying House member salaries. If Congressman Schaeffer's injury is a damaged reputation resulting from his increased salary as a member of the House of Representatives, the Secretary of the Senate neither caused nor is capable of curing that injury. Secretary Sisco is not a proper party to this action.

II. JURISDICTION

Plaintiffs claim jurisdiction under 28 U.S.C. § 1331. The legislative defendants, Trandahl and Sisco, challenge personal jurisdiction, asserting that the Colorado long-arm statute does not apply to them as defendants. Additionally, the legislative defendants assert that personal jurisdiction over them in a Colorado court would violate due process. The executive defendants do not challenge jurisdiction.

Plaintiffs maintain jurisdiction is proper under 28 U.S.C. § 1331, which reads: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." (Complaint at 3, ¶ 9.) Because the central issue in this case involves an Amendment to the Constitution, 28 U.S.C. § 1331 applies. (*Id.*)

For the existence of personal jurisdiction over a defendant, there must be "a constitutionally sufficient relationship between the defendant and the forum." *Omni Capital Int'l, Ltd. V. Rudolf Wolff & Co., Ltd.*, 484 U.S. 97, 104 (1987). In addition, service of summons on the defendant must be authorized under Rule 4 of the Federal Rules of Civil Procedure. *Id.* Rule 4(e) defines jurisdiction, declaring that the law of the state in which the

federal district court is located controls the district court's personal jurisdiction. *Wenz v. Memery Crystal*, 55 F.3d 1503, 1506 (10th Cir. 1995). If the defendant falls under applicable state law, the district court then determines if jurisdiction comports with due process requirements of the Constitution. *Id.* at 1507.

The Colorado law controlling jurisdiction is known as the long-arm statute. That statute applies Colorado jurisdiction to any person, whether or not a resident of Colorado, if the cause of action arises from the transaction of any business within the state. COLO. REV. STAT. § 13-1-124 (1998). Defendants argue non-resident government officials who do not perform their work in, or travel to, Colorado, are not subject to Colorado's long-arm statute. *See First Western Gov't. Securities, Inc. v. U.S.*, 578 F.Supp. 212, 215 (D.Colo. 1984), *aff'd*, 796 F.2d 356 (10th Cir. 1986). Both the Clerk of the House and the Secretary of the Senate perform their jobs in Washington, D.C. They do not transact business in Colorado.

Legislative defendants then offer arguments that jurisdiction in Colorado would violate their constitutionally guaranteed due process rights. To meet due process in Colorado, a plaintiff must satisfy a three-prong test: 1) The defendant must avail himself of the privilege of acting in Colorado; 2) the claim must arise from consequences in Colorado of the defendant's activities; and 3) the defendant's activities or their consequences must have a substantial enough connection with Colorado to make jurisdiction reasonable. *Plus System, Inc. v. New England Network, Inc.*, 804 F.Supp 111, 117 (D.Colo. 1992). Generally, due process is satisfied through the establishment of minimum contacts in the forum state "such that

the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *International Shoe Co. v. State of Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

Defendant Sisco cites various authorities, including a ruling from the Eighth Circuit, to argue that payment alone, through the use of bank facilities, is not enough to satisfy the requirements of due process. *See, e.g., T.J. Raney & Sons v. Security Sav. & Loan Ass'n*, 749 F.2d 523, 525 (8th Cir. 1984) (per curiam). If the legislative defendants injured Congressman Schaeffer through their involvement in paying congressional salaries, they have not established minimum contacts with Colorado merely by transferring money to banks in Colorado.

Plaintiffs answer these arguments with a general recitation of Rule 82 of the Federal Rules of Civil Procedure: "These rules shall not be construed to extend or limit the jurisdiction of the United States district courts. . . . " FED.R.CIV.P. 82. Plaintiffs fail to show how defendants have used Rule 4 to extend or limit the jurisdiction of the court. Rather, defendants show Rule 4 works along with 28 U.S.C. 1331 to *define* jurisdiction. Plaintiffs also argue defendants are representatives of the United States, which invested $2,152,961,000 in Colorado in 1998. Contributing over two billion dollars to Colorado establishes minimum contacts with Colorado, according to the plaintiffs. Defendants reply that consequences in Colorado of acts performed by remote defendants are insufficient to establish personal jurisdiction over that plaintiff unless the plaintiff can show "an action of the defendant purposefully directed toward the forum State." *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 112 (1987).

Plaintiffs fail to show the legislative defendants can be reached by Colorado's long-arm statute. Beyond that, defendants raise valued objections to personal jurisdiction on due process grounds, claiming that the plaintiffs fail to meet Colorado's three-prong test and that the defendants do not have sufficient minimum contacts to reasonably expect they would be haled into court in Colorado. I cannot exercise personal jurisdiction over the legislative defendants.

III. VENUE

Plaintiffs state venue in Colorado is correct under 28 U.S.C. § 1391(e). As with the jurisdiction issue, the executive branch defendants, President Clinton and Treasury Secretary Rubin, do not contest venue. As with the issue of jurisdiction, the legislative defendants advance mutually similar arguments against venue, contending 28 U.S.C. § 1391(e) is not applicable to the legislative branch. Plaintiffs respond that 28 U.S.C. § 1402(a)(1), governing civil actions under 28 U.S.C. § 1346, applies to legislative defendants. The legislative defendants offer substantial authority that 28 U.S.C. § 1402(a)(1) does not apply in this case.

Plaintiffs state simply: "Venue is proper in the United States District Court for the District of Colorado pursuant to 28 U.S.C. § 1391(e)." (Complaint at 3, ¶ 10.) The federal statute provides in pertinent part:

> A civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under cover of legal authority, or an agency of the

> United States, or the United States, may, except as otherwise provided by law, be brought in any judicial district in which . . . (3) the plaintiff resides if no real property is involved in the action.

28 U.S.C. § 1391(e). The legislative defendants contest venue with two arguments. First, they claim 28 U.S.C. § 1391(e) is inapplicable to the legislative branch. The legislative history of § 1391(e) indicates it was meant to control venue in cases against the executive branch only. Legislative history reveals the limited staff of Congress, working predominantly in Washington, D.C., would be disrupted if forced to defend civil actions in locations other than Washington. The executive branch, with its larger staff and agencies in widespread locations, is better prepared to appear in district courts around the country. *See Liberation News Service v. Eastland*, 426 F.2d 1379, 1384 (2d Cir. 1970).

Second, defendants contend, the appropriate standard for venue is found in 28 U.S.C. § 1391(b), which states: "A civil action wherein jurisdiction is not founded solely on diversity of citizenship may, except as otherwise provided by law, be brought only in . . . (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred. . . . " Defendants maintain the only appropriate venue for this action is the District Court for the District of Columbia. They cite a Northern District of New York case holding the proper venue under 28 U.S.C. § 1391(a) in an action against state officials to be the district where the state official maintained his official residence. *See Neville v. Dearie*, 745 F.Supp. 99, 102 (N.D.N.Y. 1990). That court went on to

state defendants who are federal officials have traditionally fallen under the same rule. *Id.* The official residence of a federal official is defined as the place where that official performs his official duties. *Id.* From this, the legislative defendants reason the only proper venue under 28 U.S.C. § 1391 is the district court where the defendants perform their official duties, the District of Columbia. The legislative defendants refer to several cases, including *Humphrey* and *Boehner*, which involved challenges to congressional pay, and which were filed and decided in the D.C. District. Because the instant case involves action by federal officials in the course of their duties, the District of Columbia is the appropriate venue.

Plaintiffs appear to find this argument plausible. Even though they agree that § 1391(e) is appropriate to establish venue against the executive defendants, they claim venue against the legislative defendants is proper under 28 U.S.C. § 1402(a)(1). That statute controls venue in actions under 28 U.S.C. § 1346, the Tucker Act. The Tucker Act grants original jurisdiction to U.S. District Courts in a constitutionally based civil claim for damages against the United States of $10,000 or less.

The legislative defendants reply that the Tucker Act applies only to actions for money judgments, and not to suits in equity, seeking injunctive relief. See *Richardson v. Morris*, 409 U.S. 464, 465 (1973). Because this is a suit in equity, and does not seek a financial award by the court, venue is improper under 28 U.S.C. § 1402.

Plaintiffs have failed to establish the District of Colorado is the appropriate venue for this action against the legislative defendants. Instead, the legislative defendants

have shown that venue is improper in Colorado and that the District of Columbia is the proper venue.

IV. RIPENESS

An immutable requirement of a case or controversy is ripeness. To show the case is ripe for adjudication, a plaintiff must allege an injury that is present or direct and imminent, not speculative or contingent upon future events. *New Mexicans for Bill Richardson*, 64 F.3d at 1499. Legislative defendants argue this case is not ripe because the complaint does not identify which COLA injured the plaintiff.

Plaintiffs respond the case is ripe because the automatic mechanism opening the COLAs can adjust congressional pay at any time in the future. Additionally, plaintiffs argue that the COLAs in 1992, 1993, and 1998 caused them injury. Of these, only the most recent – in 1998 – could be considered injurious to plaintiff Schaeffer. The first COLA, in 1992, was effective before the ratification of the Twenty-seventh Amendment. The plaintiffs may as well argue that the Salary Act of 1873 did not comport with the Twenty-seventh Amendment. The argument fails because the Twenty-seventh Amendment was not part of the Constitution at the time the injury was alleged to have taken place.

The next COLA, in 1993, also did not injure Congressman Schaeffer, because he was not a member of Congress until 1997. Schaeffer's alleged injury, damage in the eyes of his constituents resulting from illegal pay

raises, could not have preceded his tenure as a congressman. Only the most recent COLA, effective in January of 1998, had any effect on Congressman Schaeffer.

Plaintiffs stop short of targeting a single COLA as the source of their injury. Their suggestion that the formula currently in effect to calculate future congressional pay adjustments operates to create a direct, imminent injury is exactly the kind of complaint that the ripeness requirement prevents. *Boehner*, however, was filed and decided in 1992, before the first COLA that followed the Amendment. Neither the district court, nor the court of appeals, dismissed the complaint in *Boehner* on ripeness grounds. The ripeness discussion in *Boehner* centered on another provision of the Ethics Reform Act, quadrennial pay adjustments to members of Congress. The instant complaint states plaintiffs' injuries are limited to COLAs, without mention of the quadrennial pay increases. (Complaint at 5.) The ripeness discussion in *Boehner* is thus inapplicable. If Congressman Schaeffer was injured, it was by the 1998 COLA. Such in injury would be ripe for adjudication.

V. FAILURE TO STATE A CLAIM – FED.R.CIV.P. 12(b)(6)

Defendants from the House, the Senate, and the executive branch assert essentially common arguments that the complaint fails to state a claim upon which relief may be granted. A Rule 12(b)(6) dismissal is appropriate only if " 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle

him to relief.' " *Gaines-Tabb v. ICI Explosives, USA, Inc.*, (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).

The core argument is that the annual COLAs provided by the Ethics Reform Act of 1989 are not independent laws under the Twenty-seventh Amendment. Additionally, defendants propose pensions are not controlled by the Twenty-seventh Amendment and the Amendment's legislative purpose is not served by the maintenance of this lawsuit. Plaintiffs gainsay defendants' Rule 12(b)(6) arguments, claiming that the 27th Amendment does control COLAs and that the legislative purpose is, in fact, served through this action.

Defendants begin by establishing that a COLA is not a law. Article I, Section 7 of the Constitution defines the framework and sequence for the flow of bills through Congress and to the President. Article I provides new laws are enacted when a bill passed by each House of Congress is signed by the President. Following this logic, a formula to create annual salary adjustments does not create a new law with each adjustment since the adjustments are not contingent upon passage by Congress and the President's signature.

Defendants assert the language and history of the Ethics Reform Act of 1989 anticipated the ratification of Twenty-seventh Amendment. The structure and timetable of the pay raises was in keeping with the spirit of the Amendment; the first COLA was not to take effect until 1991, even though the law was enacted in 1989. Between the enactment of the law in 1989 and the first effective COLA in 1991 was an intervening election of Representatives in 1990. Defendants argue that what went into effect

in 1991 was the COLA mechanism, not merely a single COLA. They cite the D.C. Circuit's holding in *Boehner* in support of their contention that annual COLAs are not independent laws.

To clarify the effective date of the COLA provisions of the Ethics Reform Act, defendants cite several cases to show, absent provisions to the contrary, federal legislation becomes effective on the day it is enacted. *Air-Shields, Inc. v. Fullam*, 891 F.2d 65, 65 (3d Cir. 1989); *United States v. Affleck*, 765 F.2d 944, 948 (10th Cir. 1985). In the case of the Ethics Reform Act, however, specific language in the legislation deferred the effective date of the COLA mechanism until after the 1990 congressional election. This explicit language prescribing the effective date of one part of the Ethics Reform Act indicates the Act complied with the spirit of the Twenty-seventh Amendment even before the Amendment's ratification. In doing so, Congress clarified the Act did not take effect "until an election of Representatives (had) intervened."

Defendants maintain the rigid structure for determining congressional compensation advocated by plaintiffs has no constitutional or legal basis. Defendants point to *Humphrey v. Baker*, 848 F.2d 211, 215 (D.C. Cir. 1988), which held Congress was within its Ascertainment Clause power in delegating administrative authority to adjust congressional salaries, as long as the procedures for adjusting the compensation were ascertained by law. Finally, and perhaps most persuasively, defendants cite *Boehner*, where Judge Ginsburg stated: "We see no reason whatsoever why the Congress cannot, for convenience, instead specify an index or formula with the same effect."

Boehner, 30 F.3d at 162. Plaintiffs reply the Twenty-seventh Amendment controls *Humphrey*, not *vice versa*. Plaintiffs stop short, however, of demonstrating how the Amendment can be applied to *Humphrey*, and how such an application works in their favor.

Adjustments to congressional salaries under the Ethics Reform Act are not discretionary acts of Congress. The adjustments are calculations performed by non-legislative administrative staff, following a specific formula provided by Congress in the Act. Members of Congress do not participate in the calculation of pay increases. In removing members of Congress from the pay adjustment process, the Ethics Reform Act accomplishes the goal of the Founding Fathers manifested in the Twenty-seventh Amendment. The Act eliminates the possibility that Congress will grant itself a new pay raise during its current session.

Defendants again raise the argument that the Twenty-seventh Amendment does not apply to congressional pensions. Plaintiffs offer no authority to show the Amendment does apply to pensions. As discussed previously, Congressmen Schaeffer does not receive a pension at this time. Any claim regarding pensions must fail because 1) the Amendment does not cover pensions, and 2) Congressmen Schaeffer cannot present a ripe case involving a pension-based injury to himself.

VI. BOEHNER V. ANDERSON

In *Boehner*, the D.C. Circuit granted summary judgment to the defendants, holding that the plaintiff's argument that COLAs are independent laws was not

supportable. *Boehner*, 30 F.3d at 161-62. The court did not discuss venue or jurisdiction, presumably because venue and jurisdiction were not contested.

Boehner differs from the instant case in that it was filed in the district court for the District of Columbia, in which venue was appropriate and personal jurisdiction existed over the defendants. Consequently, *Boehner* did not confront several issues that justify granting a motion to dismiss in this case. Nevertheless, *Boehner* remains strongly persuasive with respect to the merits of this case.

Boehner held annual COLAs were not independent laws under the Twenty-seventh Amendment, and Congress is within its Ascertainment Clause authority to designate a formula for making scheduled congressional pay adjustments. *Id.* at 162. Plaintiffs have failed to demonstrate a flaw in the D.C. Circuit's reasoning. Further, plaintiffs in this case cannot show this case belongs in the District of Colorado.

VII. CONCLUSION

For all the reasons set forth, I GRANT defendants' motions to dismiss and DENY plaintiffs' alternative motion for summary judgment. Accordingly,

IT IS ORDERED THAT this case is DISMISSED WITH PREJUDICE with each party to pay his own costs.

Dated this 2nd day of July, 1999 at Denver, Colorado.

/s/ John L. Kane, Jr.
JOHN L. KANE, JR.
U.S. SENIOR DISTRICT
COURT JUDGE

UNITED STATES CODE ANNOTATED
CONSTITUTION OF THE UNITED STATES

Amendment XXVII. Compensation of Senators and Representatives

No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened.

---

2 U.S.C. § 31. Compensation of Members of Congress

(1) The annual rate of pay for –

(A) each Senator, Member of the House of Representatives, and Delegate to the House of Representatives, and the Resident Commissioner from Puerto Rico.

(B) the President pro tempore of the Senate, the majority leader and the minority leader of the Senate, and the majority leader and the minority leader of the House of Representatives, and

(C) the Speaker of the House of Representatives,

shall be the rate determined for such positions under chapter 11 of this title, as adjusted by paragraph (2) of this section.

(2)(A) Subject to subparagraph (B), effective at the beginning of the first applicable pay period commencing on or after the first day of the month in which an adjustment takes effect under section 5303 of Title 5 in the rates of pay

under the General Schedule, each annual rate referred to in paragraph (1) shall be adjusted by an amount, rounded to the nearest multiple of $100 (or if midway between multiples of $100, to the next higher multiple of $100), equal to the percentage of such annual rate which corresponds to the most recent percentage change in the ECI (relative to the date described in the next sentence), as determined under section 704(a)(1) of the Ethics Reform Act of 1989. The appropriate date under this sentence is the first day of the fiscal year in which such adjustment in the rates of pay under the General Schedule takes effect.

(B) In no event shall the percentage adjustment taking effect under subparagraph (A) in any calendar year (before rounding), in any rate of pay, exceed the percentage adjustment taking effect in such calendar year under section 5303 of Title 5 in the rates of pay under the General Schedule.

---

5 U.S.C. § 5303. Annual adjustments to pay schedules

(a) Effective as of the first day of the first applicable pay period beginning on or after January 1 of each calendar year, the rates of basic pay for each statutory pay system shall be increased by the percentage (rounded to the nearest one-tenth of 1 percent) equal to one-half of 1 percentage point less than the percentage by which the ECI for the base quarter of the year before the preceding calendar year of exceeds the ECI for the base quarter of

the second year before the preceding calendar year (if at all).

(b)(1) If, because of national emergency or serious economic conditions affecting the general welfare, the President should consider the pay adjustment which would otherwise be required by subsection (a) in any year to be inappropriate, the President shall –

> (A) prepare and transmit to Congress before September 1 of the preceding calendar year a plan for such alternative pay adjustments as he considers appropriate, together with the reasons therefor; and
>
> (B) adjust the rates of pay of each statutory pay system, in accordance with such plan, effective on the same day as the increase under subsection (a) would otherwise take effect.

(2) In evaluating an economic condition affecting the general welfare under this subsection, the President shall consider pertinent economic measures including, but not limited to, the indexes of Leading Economic Indicators, the Gross National Product, the unemployment rate, the budget deficit, the Consumer Price Index, the Producer Price Index, the Employment Cost Index, and the Implicit Price Deflator for Personal Consumption Expenditures.

(3) The President shall include in the report to Congress under paragraph (1)(A) his assessment of the impact that the alternative pay adjustments under this subsection will have on the Government's ability to recruit and retain well-qualified employees.

(c) The rates of basic pay that take effect under this section –

(1) shall modify, supersede, or render inapplicable, as the case may be, to the extent inconsistent therewith, any prior rates of basic pay under the statutory pay system involved (as last adjusted under this section or prior provisions of law); and

(2) shall be printed in the Federal Register and the Code of Federal Regulations.

(d) An increase in rates of basic pay that takes effect under this section is not an equivalent increase in pay within the meaning of section 5335.

(e) This section does not impair any authority pursuant to which rates of basic pay may be fixed by administrative action.

(f) Pay may not be paid, by reason of any provision of this section (disregarding any comparability payment payable), at a rate in excess of the rate of basic pay payable for level V of the Executive Schedule.

(g) Any rate of pay under this section shall be initially adjusted, effective on the effective date of the rate of pay, under conversion rules prescribed by the President or by such agency or agencies as the President may designate.

5 U.S.C. § 5318. Adjustments in rates of pay

(a) Subject to subsection (b), effective at the beginning of the first applicable pay period commencing on or after the first day of the month in which an adjustment takes effect under section 5303 of this title in the rates of pay under the General Schedule, the annual rate of pay for positions of each level of the Executive Schedule shall be adjusted by an amount, rounded to the nearest multiple of $100 (or if midway between multiples of $100, to the next higher multiple of $100), equal to the percentage of such annual rate of pay which corresponds to the most recent percentage change in the ECI (relative to the date described in the next sentence), as determined under section 704(a)(1) of the Ethics Reform Act of 1989. The appropriate date under this sentence is the first day of the fiscal year in which such adjustment in the rates of pay under the General Schedule takes effect.

(b) In no event shall the percentage adjustment taking effect under subsection (a) in any calendar year (before rounding), in any rate of pay, exceed the percentage adjustment taking effect in such calendar year under section 5303 in the rates of pay under the General Schedule.

(2)

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No. 01-94

In The

Supreme Court of the United States

HON. BOB SCHAFFER, member of the United States House of Representatives,

Petitioner,

v.

PAUL O'NEILL, Secretary of the Treasury,

Respondent.

On Petition for A Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF *AMICUS CURIAE* THE CLAREMONT INSTITUTE CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether a member of Congress has standing either *as a taxpayer* or *as a member of Congress* to challenge alleged violations of the Twenty-Seventh Amendment?

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HON. BOB SCHAFFER, member of the United States House of Representatives,

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BRIEF OF *AMICUS CURIAE* THE CLAREMONT INSTITUTE CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

INTEREST OF AMICUS CURIAE[1]

The Claremont Institute for the Study of Statesmanship and Political Philosophy is a non-profit educational foundation whose stated mission is to "restore the principles of the American Founding to their rightful and preeminent authority in our national life," including the principle, at

[1] The Claremont Institute Center for Constitutional Jurisprudence files this brief with the consent of all parties. The letters granting consent are being filed concurrently. Counsel for a party did not author this brief in whole or in part. No person or entity, other than *amicus curiae*, its members, or its counsel made a monetary contribution specifically for the preparation or submission of this brief.

issue in this case, that the Constitution's limitations on federal power are judicially enforceable. The Institute pursues its mission through academic research, publications, and scholarly conferences. Of particular relevance here, Institute scholars have published a number of books and monographs on the manner in which Congress has exceeded its Constitutional limitations and on the importance of permitting judicial review of those Constitutional violations. *See, e.g.*, GORDON JONES AND JOHN MARINI, THE IMPERIAL CONGRESS: CRISIS IN THE SEPARATION OF POWERS (1989); John C. Eastman, *Restoring the "General" to The General Welfare Clause*, 4 CHAPMAN L. REV. 63 (2001).

In 1999, the Claremont Institute established an in-house public interest law firm, the Center for Constitutional Jurisprudence, whose purpose is to further the mission of the Institute through strategic litigation and the filing of *amicus curiae* briefs in cases of constitutional significance. The Center has previously participated as amicus curiae in this Court in such important cases as *Adarand Constructors* v. *Mineta*, No. 00-730 (pending); *Solid Waste Agency of Northern Cook County* v. *U.S. Army Corps of Engineers*, 531 U.S. 159 (2001); *United States* v. *Morrison*, 529 U.S. 598 (2000); and *Boy Scouts of America* v. *Dale*, 520 U.S. 640 (2000).

STATEMENT OF THE CASE

Written in 1789 and ratified in 1992, the Twenty-Seventh Amendment holds that "No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened." The state legislature of Michigan ratified this amendment on May 7, 1992, becoming the 38th state legislature to do so and thus meeting the three-fourths requirement specified in Article V of the Constitution. Congress acknowledged the newly-ratified Amendment as part of the Constitution two weeks later. *See* S. Con. Res. 120, 102d Cong., 2d Sess. (May 20, 1992).

Just before the Amendment was ratified, Congress

passed a law to permit automatic "Cost of Living Adjustments" (COLAs) in the rate of pay for its members. *See* 101 P.L. 194, 103 Stat. 1716, Title XI (2001). This statute sets forth a formula for determining by what amount "the rate of pay of each office and position of United States Senator, the President pro tempore of the Senate, and the majority and minority leaders of the Senate shall be increased." *Id.*

Hon. Bob Schaffer, a Representative from Colorado, joined with other taxpayers to bring this suit challenging the COLA provisions under the Twenty-Seventh Amendment. *See Schaffer* v. *Clinton*, 54 F.Supp.2d 1014 (D. Colo. 1999). The District Court further held that taxpayer plaintiffs (other than Congressman Schaffer) in the case did not have standing to bring suit. *Id.*, at 1017-1018. The District Court held that Congressman Schaffer did have standing, but that the Amendment did not prohibit the COLAs. *Id.*, at 1024. On appeal, the Tenth Circuit rejected the District Court's holding that Congressman Schaffer had standing to bring the case, and thus did not reach the substantive claims. *Schaffer* v. *Clinton*, 240 F.3d 878, 886 (10th Cir. 2001).

SUMMARY OF ARGUMENT

The petition for *certiorari* should be granted in this case for at least three reasons:

- First, the Tenth Circuit's decision is contrary to this Court's holding in *Flast v. Cohen*, 392 U.S. 83 (1968). Although this Court has thus far declined to recognize taxpayer standing to challenge violations of any constitutional provision other than the First Amendment's Establishment Clause, the newly-adopted Twenty-Seventh Amendment is as much an explicit limitation on the spending power of Congress as the Establishment Clause. Congressman Schaffer, in his capacity *as a taxpayer*, should therefore have as much right to challenge the constitutionality of acts of Congress under the Twenty-Seventh Amendment as other taxpayers have to challenge the

constitutionality of acts of Congress under the Establishment Clause;

- Second, the Tenth Circuit's failure to afford Congressman Schaffer standing as a taxpayer failed to recognize that the jurisdiction of Article III courts extends to all cases *in equity* as well as in law. Courts of equity were designed in part to address the problem of structural violations causing harm to a large but undifferentiated class of people;

- Third, Tenth Circuit misapplied this Court's most recent decision addressing standing by members of Congress and its decision directly conflicts with D.C. Circuit's decision in *Boehner* v. *Anderson*, 30 F.3d 156 (D.C. Cir. 1994), holding that a member of Congress had standing to challenge the same statute providing automatic cost-of-living-adjustments (COLAs) to congressional salaries at issue here because of the Congressman's asserted reputational harm.

The Tenth Circuit's decision is particularly troubling because, if allowed to stand, an entire Amendment to the United States Constitution will be rendered a dead letter.

REASONS FOR GRANTING THE WRIT

I. The District Court's Denial of Standing to the Taxpayer Plaintiffs, and the Tenth Circuit's Failure to Afford Congressman Schaffer Standing in his Capacity as a Taxpayer, is Contrary to this Court's Holding in *Flast* v. *Cohen*.

The District Court dismissed the taxpayer plaintiffs (other than Congressman Schaffer) for lack of standing. Although that ruling was not appealed, the Tenth Circuit held that Congressman Schaffer – who is himself a taxpayer as well as a member of Congress – did not have standing to bring a Twenty-Seventh Amendment challenge to

congressional COLAs. The denial of standing to taxpayers challenging congressional spending that they claim is barred by an explicit constitutional prohibition is contrary to this Court's holding in *Flast* v. *Cohen*.

In *Flast*, this Court held that taxpayers may sue to enjoin federal expenditures that violate explicit constitutional prohibitions. Although *Flast* involved spending claimed to be in violation of the Establishment Clause, the rationale of *Flast* holds here as well, and should permit taxpayers to bring this suit.

Under *Flast*, a taxpayer will having standing to bring a suit against an expenditure of funds if he establishes: 1) "a logical link between that status and the type of legislative enactment attacked"; and 2) and a violation of "specific constitutional limitations imposed upon the exercise of the congress-ional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress." 392 U.S., at 102-03. When "both nexuses are established, the litigant will have shown a taxpayer's stake in the outcome of the controversy and will be a proper and appropriate party to invoke a federal court's jurisdiction." *Id.*, at 103.

These two requirements have been met in this case. First, taxpayers are the direct contributors to the funds from which members of Congress are paid; there is thus a clear link between the exactions from the taxpayer and the COLAs that automatically increase congressional salaries. Second, Congressman Schaffer challenges the COLAs as a violation of the Twenty-Seventh Amendment, which, like the Establishment Clause, provides a specific constitutional limitation on Congress's power under the Spending Clause.

Indeed, the history of the Twenty-Seventh Amendment demonstrates that it was designed to provide the same kind of express limitation on Congressional spending as the Establishment clause has been interpreted to provide. In *Flast*, this Court noted that it was proper to allow taxpayer standing in cases involving violations of the Establishment Clause because "[t]he Establishment Clause was designed as

a specific bulwark against such potential abuses of governmental power, and that clause of the First Amendment operates as a specific constitutional limitation upon the exercise by Congress of the taxing and spending power conferred by Art. I, § 8." *Id.* at 104.

The same concern with abuse of the government's tax and spend power underlies the Twenty-Seventh Amendment. Indeed, James Madison was the initial author of both provisions. *See* Richard B. Bernstein, *The Sleeper Wakes: The History and Legacy of the Twenty-Seventh Amendment*, 61 FORDHAM L. REV. 497 (1992). He drafted the specific limitation now contained in the Twenty-Seventh Amendment because of the "seeming impropriety in leaving any set of men without countroul [*sic*] to put their hand into the public coffers, to take out money to put in their pockets." James Madison, *Speech in the House of Representatives* (June 8, 1789), *reprinted in* MADISON: WRITINGS 449, 450 (J. Rakove, ed., 1999); *see also* 1 RECORDS OF THE FEDERAL CONVENTION 373-374 (M. Farrand, ed. 1911); *id.* at 215-216 ("Mr. Madison...observed that...to leave [Congressmen] to regulate their own wages was an indecent thing, and might in time prove a dangerous one"); Edmund Randolph, *Letter to the Speaker of the Virginia House of Delegates* (Oct. 10, 1787), *reprinted in* 1 DEBATE ON THE CONSTITUTION at 595, 610 (B. Bailyn, ed. 1993) (urging an amendment "incapacitating the Congress to determine their own salaries").

Clearly, then, the history of the Twenty-Seventh Amendment, like that of the First Amendment, reveals an abiding concern with the potential (or actual) misuse of "the taxing and spending power" and also reveals that the Amendment was "designed as a specific bulwark against such potential abuses of governmental power." *Flast*, 392 U.S., at 103. By its plain language, that Amendment "operates as a specific constitutional limitation upon the exercise by Congress of the taxing and spending power

conferred by Art. I, § 8." *Id.*[2]

Flast was primarily concerned with the fact that laws exceeding the limited powers of Congress could violate the First Amendment by spending money to subsidize particular religious views. The only *injury* in such a case is the violation of the constitutional prohibition, with the consequent use of the taxpayer's funds for a purpose expressly forbidden by the Constitution. No "greater" injury was necessary, because the First Amendment was written to prevent precisely that injury, according to the Court in *Flast*.

In exactly the same way, the only *injury* to Congressman Schaffer in his capacity as a taxpayer is the violation of the newest provision of the Constitution, with the consequent use of his tax funds for a purpose now expressly forbidden. Following the rule in *Flast*, no "greater" injury should be required of the Petitioner. This is particularly true in a nation such as ours whose "first principles" include a Constitution of delegated, limited powers. *United States* v. *Lopez*, 514 U.S. 549, 552 (1995). The violation of those limitations and the increased tax burden occasioned by legislators who have acted, in Jefferson's words, "contrary to the natural rights of the other members of the society," by "enlarg[ing] their own powers, prerogatives or emoluments without restraint," is injury enough to satisfy the dictates of Article III. *See* Thomas Jefferson, *A Bill for Giving The Members of The General Assembly An Adequate Allowance*, (Dec. 12, 1778), *reprinted in* 2 THE FOUNDERS' CONSTITUTION 322 (P. Kurland & R. Lerner, eds., 1987).

Indeed, the instant case is actually more compelling than *Flast*. Since *Flast* was decided, this Court has declined to exercise jurisdiction in matters that it believed could rightly be left to the political process. *See*, *e.g.*, *Garcia* v. *San*

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[2] Congress's power to determine the compensation of its members is found in U. S. Const Art. I § 6, but like the spending at issue in *Flast*, the constitutional means for deriving the funds used for the compensation is the Tax and Spend Clause of Art. I, § 8. Thus the Twenty-Seventh Amendment operates as a specific limitation on the § 8 spending power as well as the § 6 compensation power.

Antonio Metropolitan Transit Auth., 469 U.S. 528 (1985). But reliance upon the political process to prevent Constitutional violations is particularly inappropriate when the violation is itself of a political process provision. *United States* v. *Carolene Products*, 304 U.S. 144, 152 n. 4 (1938); *Baker* v. *Carr*, 369 U.S. 186, 210-211, 229 (1962). In such cases, "the greatest deterrent" – indeed, perhaps the only deterrent – "to the enactment of unconstitutional statutes by a legislature is the power of the courts to invalidate such statutes." *Illinois* v. *Krull*, 480 U.S. 340, 352 (1987).

Challenges arising under the Twenty-Seventh Amendment are necessarily matters for judicial review because the Amendment is itself specifically designed to allow the political process to check self-dealing by members of Congress. A violation of the Amendment simply cannot be cured by the very political process neutered by the violation. To rely upon the political process to cure such a violation, as the Tenth Circuit did, *see Schaffer*, 240 F.3d at 885, is for the judiciary to abandon its proper role in our constitutional system.

II. The Tenth Circuit's Failure To Recognize Congressman Schaffer's Standing As A Taxpayer Ignored The Fact That The Jurisdiction Of Article III Courts Extends To All Cases Not Just In Law But In Equity As Well.

Perhaps more fundamentally, any interpretation of Article III that prevents taxpayer standing in the circumstances presented by this and similar cases simply fails to take account of the fact that Article III courts have jurisdiction over all cases "in law *and equity*" arising under the Constitution. U.S. Const. art. III, § 2. The hornbook definition of standing – an invasion of a *legally* protected interest that is concrete and particularized as well as actual and imminent – does not even purport to address the "equity" side of federal court jurisdition.

The law has always had a particularly difficult time providing redress for small injuries inflicted upon large

groups of people where no one has a particularized harm different from the harm suffered equally by everyone else.[3] In such situations, there is a real danger that "[t]he public's business becomes nobody's business because no person has the incentive to take steps to protect that interest." Richard Epstein, *Standing and Spending—The Role of Legal* and *Equitable Principles*, 4 CHAP. L. REV.1, 30 (2001). This problem is particularly acute when, as here, constituents have no incentive to vote their own representative out of office for unconstitutionally burdening those residing in another district. Also, constituents have little incentive (or ability) to vote their own representative out of office for unconstitutional acts which tend to benefit their own districts, especially when doing so would not prevent another district's congressman from continuing to "bring home the bacon." To expect the political process to take care of itself is therefore to create a sort of standoff, or "race to the bottom," where no representative dares to stop violating the Constitution until all the others stop first.

In transactions between private parties, the government serves as a supervisory power to redress such broad and shallow injuries. But when the government itself is the perpetrator, it can hardly be expected to commence an action to control its own misconduct. In order to keep alive Holt's hope of *ubi ius,ibi remedium,* the task is to position *someone* to challenge the system-wide irregularities. *See* Epstein,

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[3] Public choice economics demonstrates that governmental programs which burden a large population in a relatively small degree, but confer a large benefit on a small population, will tend to survive in the long run, regardless of their unfairness. This is because it will always be worthwhile to the beneficiary class to lobby the legislature for greater benefits, while those who pay the bill can never afford to unite to put a stop to the practice. *See further* JAMES BUCHANAN AND GORDON TULLOCK, THE CALCULUS OF CONSENT (1962); Robert D. Tollison, *Public Choice and Legislation*, 74 Va. L. Rev. 339, 341-342 (Mar. 1988) ("groups who can organize for less than one dollar in order to obtain one dollar of benefits from legislation will be the effective demanders of laws").

supra, at 22. The logical parties to make such a challenge in this case are those parties who stand on either side of the Twenty-Seventh Amendment window: the taxpayers who pay, and the Congressman who receives, the salary increased according to the COLA scheme.

Taxpayers are actually in a better position to bring such challenges, because theirs is the more recognizable harm. Yet the general bar on taxpayer standing, raised by the *legal* requirement of particularized harm, allows the government to engage in structural violations with impunity, just so long as it does so at the expense of *a lot* of people instead of a few. Such structural violations, causing widespread but diffused harms, is exactly what courts of *equity* were designed to prevent. *See* Federalist No. 78 (A. Hamilton) ("the courts were *designed* to be an intermediate body between the people and the legislature, in order, among other things, *to keep the latter within the limits assigned to their authority*" (emphasis added)).

In *Crampton* v. *Zabriskie*, this Court expressly recognized "the right of resident tax-payers to invoke the interposition of a court *of equity* to prevent an illegal disposition of the moneys of the county." 101 U.S. 601, 609 (1879) (emphasis added).[4] This was so because only it could "prevent the consummation of a wrong, when the officers of [the government] assume, in excess of their powers, to create burdens on property-holders." *Id.*; *see also* James Wilson, *Speech in the Pennsylvania Ratification Convention* (Dec. 1, 1787), *reprinted in* 1 DEBATES ON THE CONSTITUTION 820, 822-823 (B. Bailyn, ed., 1993) ("under this constitution, the legislature may be restrained, and kept within its prescribed

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[4] *Crampton* has never been overruled, but subsequent decisions such as *Frothingham* v. *Mellon*, 262 U.S. 447 (1923), have limited its holding to cases brought against *cities* by taxpayers. This is a distinction without a difference. "[T]here is nothing to suggest that the right to enjoin illegal behavior in *Crampton* depended on the taxpayer being able to show some minimum level of financial harm.... [*Frothingham*] does not explain why the difference in the number of taxpayers at the federal level works a difference in principle." Epstein, *supra* at 35.

bounds, by the interposition of the judicial department").

Even today, the principle that federal courts of equity may address such structural (but undifferentiated) harms is routinely recognized in analogous contexts such as shareholder derivative suits, where individual shareholders are afforded standing to raise the claims of the entire class despite their lack of any particularized harm. *See, e.g.*, Fed. R. Civ. P. 23; *see also* Epstein, *supra*, at 49. There is no reason – textual or otherwise – why the "equity" language of Article III does not equally apply to taxpayer challenges to violations of the Constitution's structural limits. In such circumstances, it is particularly important for the federal courts to apply this Court's equity-based rule in *Flast* rather than the contrary, law-based rule in *Frothingham* v. *Mellon*, 262 U.S. 447 (1923). The Circuit Court's failure to follow *Flast* therefore places its decision in conflict both with this Court and with Article III.

III. The Tenth Circuit's Decision Misapplied *Raines* v. *Byrd* and Is In Direct Conflict with a decision of the D.C. Circuit.

Even assuming *Flast* does not apply to afford Congressman Schaffer standing as a taxpayer, the Tenth Circuit's rejection of Congressman Schaffer's standing as a member of Congress misapplied this Court's recent ruling in *Raines* v. *Byrd* and is in direct conflict with the D.C. Circuit's decision in *Boehner* v. *Anderson*, 30 F.3d 156 (D.C. Cir. 1994).

Current standing rules require that a plaintiff allege a legally cognizable injury, fairly traceable to the defendant's conduct, which a favorable judgment is likely to redress. *Allen* v. *Wright*, 468 U.S. 737, 751 (1984). Congressman Schaffer alleged that his personal reputation was injured by the unconstitutional mechanism for adjusting his pay as a Congressman. That injury is clearly within the scope of the language of the Twenty-Seventh Amendment, and is one that this Court has both the power and the "duty" to redress via its power of judicial review. *Marbury v. Madison*, 1 Cranch

(5 U.S.) 137, 177-178 (1803).

However, the Circuit Court held that Congressman Schaffer had no standing to bring this case because his injury was primarily political, and not cognizable by the court. In doing so, the Circuit Court mistakenly relied upon *Raines* v. *Byrd*, 521 U.S. 811 (1997), and expressly refused to follow the D.C. Circuit's decision in *Boehner* v. *Anderson*, a case directly on point.

A. The Circuit Court Misapplied The Reasoning Behind This Court's Standing Jurisprudence in Holding That Congressman Schaffer is Seeking Redress of A Political Injury.

In holding that a Congressman has no standing to bring a case under the Twenty-Seventh Amendment, the Circuit Court relied heavily upon *Raines*. It held that because the COLAs apply to all Congressmen equally, Congressman Schaffer had not been "singled out" for any special injury sufficient to confer standing upon him under *Raines*. *See Schaffer* v. *Clinton*, 240 F.3d 878, 885 (10th Cir. 2001). But this misapplies *Raines* both substantively, and as a matter of policy.

In *Raines*, Senator Robert Byrd brought suit to challenge the constitutionality of the line-item veto. He alleged that he had been injured because the line-item veto "diluted his vote" as a member of Congress. The Court held that while "legislators whose votes would have been sufficient to defeat (or enact) a specific legislative act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified," legislators whose votes were merely rendered less potentially "effective" would not have standing to sue. *Raines*, 521 U.S., at 823, 825-826.[5] Moreover, the Court in

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[5] Other courts have also upheld "legislative standing" in certain situations. *See, e.g., Kennedy* v. *Sampson*, 511 F.2d 430 (D.C. Cir. 1974). In that case, the D.C. Circuit noted that the purpose of the standing

Raines was concerned with a perennial problem in American law: keeping political questions within the legislature, rather than in the courts. *See id.*, at 827 (warning that "the federal courts [might be] improperly and unnecessarily plunged into the bitter political battle being waged between the President and Congress").

Neither of these factors are present here. Rather than being asked to address a political question, this case asserts an actual violation of a specific constitutional provision. And rather than seeking protection of his legislative "effectiveness," Congressman Schaffer, as an elected representative of the people, is attempting to fulfill the duties of his office, which include the duty to "preserve, protect, and defend the Constitution of the United States." *See* U.S. Const. Art. VI § 3. He is not seeking a redress of a political decision, but asserting that the Constitution is being violated by a practice of Congress. The injury asserted by Petitioner is not "wholly abstract," and the attempt to litigate this matter is not "contrary to historical experience" (except insofar as the Twenty-Seventh Amendment, being less than ten years old, has never been considered by this Court before). Nor is this a case of plaintiffs attempting to "'vindicate value interests of concerned bystanders.'" *Valley Forge Christian College* v. *Americans United for Separation of Church and State*, 454 U.S. 464, 473 (1982) (quoting *United States* v. *SCRAP*, 412 U.S. 669, 687 (1973)). Petitioner is asserting a concrete, actual injury: that the Constitution has been violated by the automatic statutory mechanism of the COLAs. The purpose of the "injury" prong is to "assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker* v. *Carr*, 369 U.S. 186, 204 (1962). Such clarity does exist in this case.

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determination was not to bar cases which legitimately belong in court, but rather so "'that the questions will be framed with the necessary specificity, that the issues will be contested with the necessary adverseness and that the litigation will be pursued with the necessary vigor...'" *Id.* at 435 (quoting *Flast* v. *Cohen*, 392 U.S. 83, 106 (1968)).

B. The Tenth Circuit's Decision Expressly Conflicts With The D.C. Circuit.

The Circuit Court held also that Congressman Schaffer could allege no injury because the unconstitutional mechanism by which his salary is adjusted results in a benefit to him—*i.e.*, higher pay. *Schaffer*, 240 F.3d at 885. But this Court has never held that a person who receives some putative benefit via a violation of the Constitution is thereby estopped from challenging that Constitutional violation. In fact, the Tenth Circuit's holding in this regard is directly contrary to the D.C. Circuit's holding in *Boehner* v. *Anderson* that "a Member of Congress...has standing to challenge the operation of a law that directly determines his rate of pay," *even if* that claim is that "his pay...was unconstitutionally increased." 30 F.3d, at 160.

Standing requires only an *injury*, not a decrease in financial assets. The injury requirement may be satisfied by injuries to contract or common law rights, *see Tennessee Electric Power Co.* v. *Tennessee Valley Authority*, 306 U.S. 118, 137-138 (1939), or by violations of statutory rights, *see Warth* v. *Seldin*, 422 U.S. 490, 514 (1975), or even the "desire to use or observe an animal species." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 155, 562-563 (1992). And, more relevant to this case, the injury can be a violation of the Constitution's structural limitations on the federal government. *Flast* v. *Cohen*, 392 U.S. 83 (1968). The fact that such a violation results in a larger paycheck for Congressman Schaffer does not change the nature of a person's interest in "specific bulwark[s] against such potential abuses of governmental power." *Id.* at 104. As the D.C. Circuit held in *Boehner*, "[w]e do not think it the office of a court to insist that getting additional monetary compensation is a good when the recipient, a congressman, says that in his political position it is a bad." 30 F.3d, at 160.

It would be anomalous indeed for this Court to hold that an injury as attenuated as a change in "market conditions" is sufficient to establish standing, *Clinton* v. *New York City*,

524 U.S. 417 (1998), but that a Congressman and a taxpayer, the two people in the best — indeed, the *only* — positions to bring a case alleging a violation of the Twenty-Seventh Amendment, do not.

For these reasons, the Circuit should have followed the holding of the D.C. Circuit in *Boehner*. Here, however, the Circuit Court expressly declined to follow *Boehner*. *See Schaffer*, 240 F.3d at 885 n.7. This creates a conflict between the Circuits, which this Court alone can remedy.

CONCLUSION

The Tenth Circuit's holding is particularly troubling because its failure to recognize either taxpayer or member of Congress standing renders the Twenty-Seventh Amendment a dead letter. Although this Court has previously noted that "the assumption that if [plaintiffs] have no standing to sue, no one would have standing, is not a reason to find standing," *Schlesinger* v. *Reservists to Stop The War*, 418 U.S. 208, 227 (1974), this Court has never gone so far as to essentially nullify an *entire Constitutional amendment* by such reasoning.

If the Constitution should be read in such a way as to grant meaning to every provision, *Lopez*, 514 U.S. at 589 (1995) (Thomas, J., concurring), it is particularly inappropriate to read the Article III case or controversy requirement in a way which would prevent *anyone*—either Congressmen on the receiving end of the paychecks, or taxpayers on the giving end—from suing to enforce the provisions of an entire constitutional amendment. In fact, in the speech with which he introduced his slate of amendments, including his proposal that would eventually become the Twenty-Seventh Amendment at issue here, James Madison noted that if amendments "are incorporated into the constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive;

they will be naturally lead to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights." James Madison, *Speech in the House of Representatives*, (June 8, 1789), *reprinted in* MADISON: WRITINGS 449 (J. Rakove, ed., 1999); *see also Boehner*, 30 F.3d, at 161 ("it would be an abuse of our equitable discretion not to hear Mr. Boehner's case").

The writ of *certiorari* should be granted so that the Tenth Circuit's bar on standing, which has nullified an entire constitutional amendment, can be lifted.

Respectfully submitted,

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No. 01-94

In the Supreme Court of the United States

BOB SCHAFFER, MEMBER OF CONGRESS, PETITIONER

v.

PAUL H. O'NEILL, SECRETARY OF THE TREASURY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Under the Ethics Reform Act of 1989, Pub. L. No. 101-194, 103 Stat. 1716, the salaries of Members of Congress and other senior government officials are adjusted annually according to the Employee Cost Index calculated by the Bureau of Labor Statistics, unless Congress passes and the President signs a law disallowing such an adjustment. 2 U.S.C. 31. Petitioner, a Member of Congress, contends that the Ethics Reform Act's provision for adjustments of congressional salaries contravenes the Twenty-Seventh Amendment, which provides that "[n]o law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened." The question presented is whether petitioner has standing to challenge the constitutionality of the salary-adjustment provisions of the Ethics Reform Act.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-18) is reported at 240 F.3d 878. The opinion of the district court (Pet. App. 19-41) is reported at 54 F. Supp. 2d 1014.

JURISDICTION

The judgment of the court of appeals was entered on February 13, 2001. On April 30, 2001, Justice Breyer entered an order extending the time within which to file a petition for a writ of certiorari to and including July 13, 2001, and the petition was filed on that date. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATEMENT

1. The Twenty-Seventh Amendment became part of the Constitution in 1992, more than 200 years after it was proposed to the States by Congress. See 57 Fed. Reg. 21,187 (1992). The Amendment provides that "[n]o law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened." U.S. Const. Amend. XXVII.

Before 1967, congressional salaries were set "directly by Congress, in specific legislation setting specific rates of pay." *Humphrey* v. *Baker*, 848 F.2d 211, 212 (D.C. Cir.), cert. denied, 488 U.S. 966 (1988). Since 1967, Congress has established various mechanisms for periodically adjusting its Members' pay without enacting statutes prescribing specific amounts. The Federal Salary Act of 1967 established a Quadrennial Commission to propose to the President salary levels for the top-level government officials, including Members of Congress. See Pub. L. No. 90-206, § 225, 81 Stat. 642. That statute authorized the President to modify the Commission's proposals in transmitting his pay recommendations to Congress. In 1977, Congress amended the Federal Salary Act to require affirmative congressional approval of the President's recommendations. Pub. L. No. 95-19, § 401, 91 Stat. 45; see *Pressler* v. *Simon*, 428 F. Supp. 302 (D.D.C. 1976) (per curiam), aff'd, 434 U.S. 1028 (1978). In 1985, after this Court's decision in *INS* v. *Chadha*, 462 U.S. 919 (1983), Congress again amended the Federal Salary Act to authorize disapproval of the President's recommendations by joint resolution, with presentation to the President. Pub. L. No. 99-190, § 135(e), 99 Stat. 1322; see *Humphrey* v. *Baker*, 848 F.2d at 217.

Congress also enacted separate legislation that authorized cost-of-living adjustments for Members of Congress and certain other federal employees. The Executive Salary Cost-of-Living Adjustment Act of 1975, Pub. L. No. 94-82, § 204(a), 89 Stat. 421, authorized the President to adjust the salaries of Members of Congress and other federal employees annually, based on a comparison with private-sector salaries. That adjustment was subject to disapproval by Congress. See *United States* v. *Will*, 449 U.S. 200, 203-204 (1980).

2. In 1989, Congress overhauled the provisions governing congressional and other federal employees' salaries and enacted the provisions challenged in this action. Congress adopted in large part the recommendations of a Bipartisan Task Force on Ethics. The Task Force proposed, *inter alia*, to compensate employees in all Branches of the government for erosion in the purchasing power of their salaries since 1969, to create a smoother mechanism for adjusting pay in the future, and to phase out private honorarium supplements to Members' compensation. See 135 Cong. Rec. 30,740-30,759 (1989) (reprinting Task Force report).

The resulting Ethics Reform Act of 1989 (Act), Pub. L. No. 101-194, 103 Stat. 1716, granted Members of Congress a one-time 25% pay increase and implemented a system to phase out the acceptance of honoraria. The Act also modified the method by which an annual adjustment to the salaries of Members of Congress is determined. Congress adopted a proposal that the annual percentage increase, if any, be based on changes in the Employment Cost Index (ECI), minus one-half percent. See 2 U.S.C. 31(2); 5 U.S.C. 5303(a). The ECI is "a quarterly index of wages and salaries for private industry as published by the Bureau of Labor Statistics." 135 Cong. Rec. at 30,757. Congress also

provided that the increase in congressional salaries could not exceed five percent in any year. See Pub. L. No. 101-194, § 704(a)(1)(B)(iii), 103 Stat. 1769.

Congress postponed the effective date of the new adjustment mechanism until January 1, 1991, after an intervening congressional election. Since then, Members of both Houses have received automatic salary adjustments in 1991, 1992, 1993, 1998, 2000, and 2001. By legislation, Congress stopped adjustments in 1994, 1995, 1996, 1997, and 1999, before they went into effect. See Pet. 8; Pet. App. 4-5, 38.

3. In 1992, several plaintiffs, including Representative John Boehner, filed an action in the United States District Court for the District of Columbia, challenging the adjustment provisions of the Ethics Reform Act as unconstitutional under the newly ratified Twenty-Seventh Amendment. That lawsuit raised substantially the same claims asserted in this action. The district court granted summary judgment upholding the statute, *Boehner* v. *Anderson*, 809 F. Supp. 138 (D.D.C. 1992), and the District of Columbia Circuit affirmed, 30 F.3d 156 (1994). The District of Columbia Circuit held that Representative Boehner had standing to challenge the manner in which his rate of pay was to be determined, *id.* at 160, but went on to hold that the congressional salary-adjustment provision of the Ethics Reform Act of 1989 does not contravene the Twenty-Seventh Amendment "because it did not cause any adjustment to congressional compensation until after the election of 1990 and the seating of the new Congress." *Id.* at 162.

4. In 1999, this action, which (like *Boehner*) seeks to invalidate the adjustments in congressional salaries under the Twenty-Seventh Amendment, was initiated by four plaintiffs, including the petitioner, Representa-

tive Bob Schaffer.[1] The plaintiffs named, as defendants, then-President Clinton, then-Secretary of the Treasury Robert E. Rubin,[2] then-Secretary of the Senate Gary Sisco, and Clerk of the House of Representatives Jeff Trandahl. See Pet. App. 27-30. The complaint asked the district court to declare that the salary-adjustment provision of the Ethics Reform Act violates the Twenty-Seventh Amendment, declare "that any pay increase for members of the United States Congress must be enacted by an affirmative vote and may not take effect until the following Congress has been elected and fully sworn into office," and enjoin any payments to any Member of Congress as a result of any salary increase "that does not comply with the requirement of an intervening election in the 27th Amendment." Pet. C.A. App. 14.

The district court granted the defendants' motions to dismiss and denied the plaintiffs' motion for summary judgment. The court held that the Secretary of the Senate and the Clerk of the House of Representatives were improper defendants because, among other things, petitioner's injury could not be traced to, or

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[1] The other plaintiffs in the district court were Walt Mueller, a Missouri State Senator who voted to adopt the Twenty-Seventh Amendment in the Missouri Senate; Gregory D. Watson, a taxpayer and activist in the movement to ratify the Twenty-Seventh Amendment; and John Stoeffler, a taxpayer. Pet. App. 19. The district court held that Watson, Stoeffler, and Mueller lacked standing to bring the action. *Id.* at 22-24. That ruling was not appealed. Thus, the only plaintiff before the court of appeals and before this Court who may assert standing to challenge the congressional salary adjustments is Representative Schaffer.

[2] After Secretary Rubin resigned in May 1999, he was replaced as a party in the case by then-Secretary Lawrence H. Summers. The current Secretary of the Treasury, Paul H. O'Neill, has been substituted as the respondent to this petition.

resolved by, them. Pet. App. 27-30, 33-36. Among other points, the district court noted that the payment of salaries of Members of the House of Representatives is not the function of the Clerk of the House, but is rather under the supervision of the Chief Administrative Officer of the House, who was not named as a defendant to the action. *Id.* at 27-28. As to the Executive Branch defendants, the court stated that, "[i]f the extent of the president's responsibility in this case is his role in the payment of pensions to retired congressmen and their spouses, the president has not injured the plaintiffs and should not be a party to this suit." *Id.* at 28. The court did not address the propriety of naming the Secretary of the Treasury as a defendant. On the merits, the district court held that the annual congressional salary adjustments do not contravene the Twenty-Seventh Amendment. *Id.* at 37-40.

5. The court of appeals affirmed the dismissal of the case, but on different grounds. The court held that petitioner lacked Article III standing to challenge the congressional salary adjustments on Twenty-Seventh Amendment grounds. Pet. App. 1-18.[3]

The court ruled that petitioner had suffered no actual, personal injury from operation of the challenged statutory scheme that gave him a salary increase. The court observed that petitioner had contended that the salary adjustment caused him injury because it was "personally offensive and professionally harmful to [him], as well as damaging to his political position and his credibility among his constituency." Pet. App. 11 (quoting Pet. C.A. Reply Br. 1). None of those claims of

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[3] Petitioner did not appeal the dismissal of the defendants other than the Secretary of the Treasury, nor did any of the other plaintiffs appeal any of the district court's rulings. See Pet. 2 n.1.

injury, the court held, was sufficient to provide standing.

First, the court observed, petitioner's "moral outrage, however profoundly and personally felt, does not endow him with standing to sue." Pet. App. 13. Second, the court stated that "[w]e do not see how [petitioner] could have suffered an injury in fact by receiving a nominal (though not, in economic terms, a real) *increase* in pay." *Id.* at 14. To the contrary, the court noted, "it is counterintuitive to claim 'injury' by virtue of having received more than one's due," and thus petitioner "was not injured for standing purposes simply because he received a higher salary." *Ibid.* Third, although petitioner argued that the salary adjustments had damaged him politically among his constituency, the court stressed that petitioner "points to no concrete evidence of a loss of credibility or other reputational injury," and indeed was reelected twice after receiving the salary adjustments, *id.* at 15 & n.8, and that petitioner had not been singled out for especially unfavorable treatment among Members of the House of Representatives, *id.* at 15-16.

The court also found its conclusion that petitioner lacked standing to be supported by *Raines* v. *Byrd*, 521 U.S. 811, 821 (1997), in which this Court held that Members of Congress could not challenge the constitutionality of a line-item veto on the basis that they suffered a "loss of political power." Pet. App. 16. The court of appeals disagreed with the District of Columbia Circuit's decision in *Boehner* that a Member of Congress did have standing to challenge the congressional salary adjustments, noting that that decision preceded *Raines* and finding it contrary to more recent decisions of this Court. *Id.* at 16-17.

ARGUMENT

The court of appeals correctly concluded that petitioner had not alleged any injury in fact necessary for standing to challenge congressional salary adjustments as violative of the Twenty-Seventh Amendment. Although the District of Columbia Circuit ruled in *Boehner* that a Member of Congress did have standing to challenge those salary adjustments, that decision has been superseded by this Court's intervening decision in *Raines*. Accordingly, there is no live conflict between the decision below and the District of Columbia Circuit's ruling on standing in *Boehner*.

In addition, the question whether petitioner has shown the injury in fact necessary to establish standing in this case and in *Boehner* arises in the unique setting of a challenge to a statute providing for automatic pay increases that has been in effect for more than a decade. It is therefore significant that the decision below and *Boehner* are consistent in their ultimate result, in that both in the end rejected challenges to the automatic salary adjustments, albeit on different grounds. Finally, petitioner cannot in any event make the showing of redressability necessary for standing in this particular case, because the only remaining defendant, the Secretary of the Treasury, does not issue paychecks to petitioner, and so an order against the Secretary would not provide petitioner with any relief.

1. A party seeking to invoke a federal court's jurisdiction bears the burden of establishing his standing to sue. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 561 (1992). To meet that burden, plaintiffs must satisfy at least three elements of standing that constitute an "irreducible constitutional minimum." *Id.* at 560. First, they must show an "injury in fact," namely, "an in-

vasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Ibid.* (citations and internal quotation marks omitted). Second, plaintiffs must demonstrate the existence of "a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant." *Ibid.* (internal punctuation and quotation marks omitted). Finally, "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* at 561 (citation and internal quotation marks omitted). In addition, and of particular relevance here, the Court emphasized in *Raines*, 521 U.S. at 819-820, that the standing inquiry is "especially rigorous" when the plaintiff asks a federal court to hold that an action by one of the other Branches of the federal government is unconstitutional.

The court of appeals correctly ruled, under these settled criteria for standing, that petitioner lacks standing to challenge the constitutionality of the congressional salary increases that were granted to all Members of Congress, including himself. Petitioner does not challenge the court of appeals' ruling that an increase in his salary, as such, cannot cause him injury for purposes of Article III standing. Pet. App. 14; see Pet. 12-13. Rather, petitioner maintains that the congressional salary increases have damaged his political reputation, "by arousing public suspicion and influencing his constituency's view of him." See Pet. 10. But as the court of appeals pointed out, that asserted injury is amorphous and in no way specific to petitioner; the salary adjustments, "which apply to every Representative, necessarily damage all Members of Congress equally." Pet. App. 16 (internal punctuation and quotation marks omitted). Even if the salary adjustments under the

Ethics Reform Act have damaged the reputation of Congress as an institution, there is nothing to suggest that the adjustments have, or could have, impaired petitioner's personal interests in any special way. Petitioner therefore has not shown that he has suffered any "particularized" injury, meaning that "the injury must [have] affect[ed] [him] in a personal and individual way." *Defenders of Wildlife*, 504 U.S. at 560 n.1.[4]

The court's conclusion that petitioner lacks standing is also supported by this Court's decision in *Raines*. In *Raines*, the Court ruled that Members of Congress lacked standing to attack the constitutionality of the Line Item Veto Act. 521 U.S. at 820-830. As pertinent here, the Court held that a "claim of standing * * * based on a loss of political power" (*id.* at 821) by Members of Congress is insufficiently concrete and personal to satisfy the requirements of Article III, at least where that injury is "widely dispersed" among Members of Congress, *id.* at 829. *Raines* teaches that petitioner cannot sue here because of a claimed loss of political influence as a Member of Congress that does not affect him in a uniquely personal way.

Petitioner errs in relying (Pet. 9-11) on *Meese* v. *Keene*, 481 U.S. 465 (1987), for the proposition that injury to his reputation is sufficient to establish standing. In *Keene*, the plaintiff, a California state senator, challenged the constitutionality of a federal statute that required a category of films to be labeled as "political propaganda." Keene wished to exhibit certain films

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[4] Nor, indeed, has petitioner contended that the salary increase he received cost him any votes or caused him to lose an election. In fact, as the court of appeals pointed out, petitioner was first elected to Congress in 1996, and has been re-elected twice since, each time with a substantial increase in percentage of the vote. Pet. App. 15 n.8.

falling within that category, and alleged that the mandatory labeling threatened his "personal, political and professional reputation." *Id.* at 473. Keene, however, alleged an injury that was personal to him and was not shared by all the other members of the body to which he was elected; he wished to exercise his own First Amendment rights, and claimed a chill from doing so from the government's requirement that the films he wished to exhibit be given an allegedly derogatory classification. *Id.* at 475. Thus, the Court concluded that Keene was not "merely an undifferentiated bystander with claims indistinguishable from those of the general public," *id.* at 476, but had adequately alleged particularized injury. By contrast, petitioner does not allege that he has been chilled in the exercise of any of his individual constitutional rights.

Moreover, in *Keene*, the action that allegedly caused the injury had nothing to do with Keene's status as a member of a legislative body. The governmental action affected him solely based on conduct in which he sought to engage in his personal capacity. Here, by contrast, the action of which petitioner complains is the action of the very legislative body of which he is a Member. That action—the payment of salaries that are increased in accordance with the Ethics Reform Act—applies to all Members in the same way, and it is speculative indeed that his constituents would hold him personally accoutable in a judicially cognizable way for the actions of the House of Representatives or of Congress as a whole. To the extent that petitioner asserts that his own political reputation would distinctly suffer because of charges of inconsistency in his position by contending that the automatic salary increases are unconstitutional or inappropriate while at the same time benefiting from the increases, any such injury is attributable to his own

retention of the salary increases rather than returning them to the United States, not to the payment of the salaries in the first instance.

The decision below is also consistent with *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982). In *Valley Forge*, the Court held that the plaintiffs lacked standing to challenge governmental action transferring property to a religiously affiliated institution because they had "fail[ed] to identify any personal injury suffered by them *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees." *Id.* at 485. That ruling supports the court of appeals' decision here that any personal offense to petitioner caused by a statute with which he disagrees does not create an injury sufficient to endow standing. See Pet. App. 12-13.

2. Petitioner contends (Pet. 14-16) that the decision below conflicts with the District of Columbia Circuit's decision on congressional standing in *Boehner*. Although the District of Columbia Circuit did rule in *Boehner* that a Member of Congress had standing to challenge the congressional salary adjustments, see 30 F.3d at 159-160, the analysis in that decision has been superseded by this Court's intervening decision in *Raines*. No other court of appeals has addressed congressional standing to challenge salary increases since *Raines*. Thus, there is no live circuit conflict warranting this Court's review.

The District of Columbia Circuit's decision in *Boehner* noted that Representative Boehner was not only a Member of Congress, but was an employee of the United States, and "[a]s such, he clearly has standing to challenge the operation of a law that directly deter-

mines his rate of pay." *Boehner*, 30 F.3d at 160. The court in *Boehner* went on to state that, despite the government's argument that an increase in a Representative's pay is not an injury, Representative Boehner said "that in the context of his constituency it is" an injury. *Ibid.* Thus, in the District of Columbia Circuit's view, Representative Boehner had standing in that he asserted that a pay increase was harmful to him "in his political position." *Ibid.* That analysis does not survive this Court's decision in *Raines*, which makes clear that such a generalized injury to the political position of a Member of Congress is insufficient for Article III standing. Rather, Article III requires a concrete and personalized injury, and petitioner has failed to allege one.

The decision below also does not conflict with *Miller* v. *Moore*, 169 F.3d 1119 (8th Cir. 1999). In that case, the court of appeals held that a state senator who opposed term limits for Members of Congress had standing to challenge a state constitutional amendment directing the State's elected officials to support federal term limits, and requiring that a pejorative label be placed next to the name of any incumbent official who failed to comply with that provision. See *id.* at 1122. In that case, the state action under challenge, the ballot label, itself had a direct, concrete, and pejorative effect on the plaintiff's opportunity for reelection. By contrast, in this case, the congressional salary statute affects all Members of Congress in the same manner, see *Raines*, 521 U.S. at 821, 829, and petitioner cannot show that his salary increase will "threaten [his] political career and livelihood." 169 F.3d at 1122-1123.

Nor does the decision below conflict with either *Irish Lesbian and Gay Organization* v. *Giuliani*, 143 F.3d 638 (2d Cir. 1998) (*ILGO*), or *Riggs* v. *City of Albuquer-*

que, 916 F.2d 582 (10th Cir. 1990), cert. denied, 499 U.S. 976 (1991). Those decisions simply hold that governmental actions that directly and concretely threaten an individual's or entity's personal and professional reputation may form the basis for standing. See *ILGO*, 143 F.3d at 649-651; *Riggs*, 916 F.2d at 586-587. The court of appeals in this case did not hold to the contrary. Rather, it ruled that petitioner had not alleged an injury that was "personal, particularized, [and] concrete." Pet. App. 17 (citation omitted).

3. Petitioner urges the Court (Pet. 21-25) to grant review in order to overrule its decision in *United States* v. *Richardson*, 418 U.S. 166 (1974), and find standing for litigants who do not otherwise meet the requirements of Article III, if otherwise no plaintiff would be able to challenge allegedly unconstitutional governmental action. Petitioner has given no good reason why standing requirements should be waived in this case or why this Court's holding in *Richardson* should be reexamined. Petitioner expresses concern (Pet. 21) that, if he is not permitted to sue, no one will be able to litigate the Twenty-Seventh Amendment issue sought to be raised in this case. This Court has already explained, however, that "the absence of any particular individual or class to litigate [such] claims gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process. * * * Lack of standing within the narrow confines of Art. III jurisdiction does not impair the right to assert [one's] views in the political forum or at the polls." *Richardson*, 418 U.S. at 179. Indeed, the Court has stressed that, in light of separation of powers concerns, the standing inquiry must be "especially rigorous" when action by one of the other Branches of the government is challenged as unconstitutional, and

the judiciary "must put aside the natural urge to proceed directly to the merits of [an] important dispute and to 'settle' it for the sake of convenience and efficiency." *Raines*, 521 U.S. at 819-820. Moreover, as a Member of Congress, petitioner has even greater opportunity for redress than is available to most voters: he may directly introduce bills and urge his colleagues within the House of Representatives to vote to repeal the salary statute, or to prevent automatic pay increases from going into effect, as Congress has done on several occasions since the statute was enacted.

4. Petitioner lacks standing for another, independent reason: he cannot show that a judgment against the sole remaining defendant in this case, the Secretary of the Treasury, could redress his alleged injury. To establish standing, plaintiffs must show that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Defenders of Wildlife*, 504 U.S. at 561 (internal quotation marks omitted). The Secretary of the Treasury has no role in the payment of petitioner's salary. Consequently, even if a declaratory judgment or injunction were issued against the Secretary, that order would have no effect because the Secretary could do nothing to alleviate the alleged injury. There can be no Article III standing when the defendant has taken no action that could have caused the plaintiff's injury, and an order against the defendant will not redress that injury. See *ibid.* The responsibility for all personnel who disburse salaries to Representatives resides with the Chief Administrative Officer of the House of Representatives. See 2 U.S.C. 80. Nevertheless, petitioner made no effort to amend his complaint to attempt to name a correct defendant from among House officials. Compare *Powell* v. *McCormack*, 395 U.S. 486, 493, 500,

501-506 (1969) (allowing Representative's suit to proceed against House Sergeant at Arms, who refused to pay him). Indeed, petitioner has made no demonstration that the Secretary of the Treasury has anything to do with payment of Representatives' salaries. Accordingly, even if this Court were to find that petitioner had alleged injury in fact sufficiently concrete and particularized for standing purposes, the court of appeals' decision dismissing the case for lack of standing nonetheless should be upheld.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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In The

Supreme Court of the United States

THE HONORABLE BOB SCHAFFER, CONGRESSMAN,

Petitioner,

v.

PAUL H. O'NEILL, SECRETARY OF THE UNITED STATES DEPARTMENT OF THE TREASURY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY

I. Certiorari Should Be Granted Because The Secretary's Argument That Congressman Schaffer Has Not Suffered An Injury Sufficient For Article III Standing Is Inconsistent With This Court's Holding In *Meese v. Keene.*

A. This Court and several Circuit Courts have held that damage to reputation is sufficient for Article III standing.

The Secretary asserts that the Tenth Circuit was correct in holding that a threat of damage to Congressman Schaffer's reputation is not a cognizable injury sufficient for Article III standing because Congressman Schaffer's injury was not a "personal" or "individualized" injury. *Resp. Opp. at 10.* The Secretary's assertion is in direct conflict with this Court's holding in *Meese v. Keene,* 481 U.S. 465 (1987), and other Circuit Court's holdings in *Miller v. Moore,* 169 F.3d 1119 (8th Cir. 1999); *Irish Lesbian and Gay Organization v. Giuliani,* 143 F.3d 638 (2nd Cir. 1998); and *Riggs v. City of Albuquerque,* 916 F.2d 582 (10th Cir. 1990), *cert. denied,* 499 U.S. 976 (1991).

In *Meese,* this Court held that the threat of damage to California State Senator Keene's personal, political, and professional reputation, the threat to his ability to obtain re-election, and the threat to his ability to practice his profession, each constituted a cognizable injury for standing purposes. *Id.* at 473. Relying on *Meese,* the Eighth Circuit, in *Miller v. Moore,* 169 F.3d 1119, 1122 (8th Cir. 1999), held that harm to a State Senator's political career

and livelihood, including his chances of re-election, conferred standing to challenge a state constitutional amendment. Also relying on *Meese*, the Tenth Circuit, in *Riggs v. City of Albuquerque*, 916 F.2d 582, 585 (10th Cir. 1990), held that plaintiffs had standing where they alleged harm to their personal, political, and professional reputations. Finally, the Second Circuit, in *Irish Lesbian and Gay Organization v. Giuliani*, 143 F.3d 638, 650 (2nd Cir. 1998), held that harm to an organization's reputation was sufficient to show standing.

Based on this Court's holding in *Meese* and other Circuit Courts' application of *Meese*, the threat of harm to Congressman Schaffer's personal, political, and professional reputation, as a result of his receipt of the unconstitutional COLAs, constitutes a cognizable injury sufficient to sustain Article III standing. The Tenth Circuit's holding in this case that "Congressman Schaffer has not alleged a sufficiently personal injury to establish standing" is inapposite to this Court's holding in *Meese* and numerous other Circuit Court decisions. Contrary to the Secretary's assertion, a live conflict exists between the Tenth Circuit and this Court as well as other Circuit Courts on the issue of whether damage to reputation is an injury in fact for Article III standing.

B. This Court has held that a party need not seek to avoid further injury to his reputation because the need to take such action constitutes cognizable injury.

The Secretary claims that the Tenth Circuit was correct in its conclusion that "Congressman Schaffer can

mitigate his injury by resorting to a self-help remedy – he can remit the portion of his pay he believes is unconstitutional to the Treasury." *Schaffer*, 240 F. 3d at 885. *See Resp. Opp. at 11.* Thus, the Secretary argues that, because Congressman Schaffer can mitigate his injury, he has not suffered a cognizable injury sufficient for Article III standing. *Resp. Opp. at 11-12.* In *Meese*, this Court specifically rejected the Secretary's argument.

In *Meese*, this Court held that "the need to take affirmative steps to avoid the risk of harm to reputation constitutes cognizable injury in the course of his communication with the public." *Meese*, 481 U.S. 475. Like Senator Keene in *Meese*, Congressman Schaffer "is not merely an undifferentiated bystander with claims indistinguishable from those of [others]; he would have to take affirmative steps . . . to prevent public formation of an association between [the unconstitutional pay raises he received] and his reputation." *Id.* at 476. Even if Congressman Schaffer were to take such affirmative steps to avoid the risk of harm to his reputation and return those unconstitutional COLAs to the United States government, this Court has held that the need to take those affirmative steps would still constitute a cognizable injury sufficient for Article III standing purposes.

In further attempting to prove that Congressman Schaffer lacked an injury in fact sufficient for Article III standing, the Secretary argues that "psychological" injury did not endow Congressman Schaffer with standing to sue. *Resp. Opp. at 12.* As explained previously, *Pet. at 12*, Congressman Schaffer is not relying on a "psychological" injury to provide him standing. Instead, Congressman

Schaffer's standing is based upon the fact that his personal, political, and professional reputation has been threatened to be damaged as a direct result of his receipt of the unconstitutional COLAs. Therefore, the Secretary's argument that Congressman Schaffer's "psychological" injury does not create an injury sufficient to confer standing is a red herring.

II. The District Of Columbia Circuit Court's Ruling In *Boehner* Has Not Been Superseded By This Court's Decision In *Raines*.

The Secretary asserts that although the District of Columbia Circuit ruled in *Boehner v. Anderson*, 30 F.3d 156 (D.C. Cir. 1994), that a Member of Congress did have standing to challenge the COLAs at issue in this case, that decision has been superseded by this Court's decision in *Raines*. *Resp. Opp. at 8*. The Secretary argues that the purported injury in *Raines* is the same injury suffered by Congressman Schaffer. *Resp. Opp. at 10*. The Secretary is wrong in his assertion because, in *Raines*, the Members of Congress did not have a personal stake in the alleged dispute, nor had they "been deprived of something to which they personally are entitled". *Raines v. Bryd*, 521 U.S. 811, 821 (1997).

In *Raines*, this Court did not address the situation in *Boehner*, where, as here, a Member of Congress suffered a personal, individualized injury directly affecting both his private interest as a government employee, as well as his personal, political and professional reputation. *See, Boehner*, 30 F.3d at 160-161. In fact, this Court made no mention of *Boehner* in the *Raines* decision. In *Raines*, Members of Congress did not have a personal stake in the

alleged dispute, but were, in this Court's view, merely objecting to the Line Item Veto Act because it represented a loss of political power by them. *Raines*, 521 U.S. at 821. In *Raines*, Members of Congress had suffered no individualized harm to pay or reputation, but rather complained of a generalized "institutional injury" as a result of their loss of a vote. *Id.* at 829. This Court pointed out that Members of Congress did not claim "that they have been deprived of something to which they personally are entitled." *Id.* at 821. In *Boehner*, then-Judge Ruth Bader Ginsburg, writing for the Circuit Court, held that Congressman Boehner's claim "that the Ethics Reform Act unconstitutionally interferes with the amount and timing of his pay is a straightforward challenge to the constitutionality of a public law that directly affects his private interest as a government employee." *Boehner*, 30 F.3d at 160.

Unlike the Members of Congress in *Raines*, but like the Members of Congress in *Boehner*, Congressman Schaffer claims that he has been "deprived of something to which [he] personally [is] entitled." That is, Congressman Schaffer's standing lies, as in *Meese* and *Boehner*, in the threat of harm to his reputation and the impact on the amount and timing of his pay. *Meese*, 481 U.S. at 475; *Boehner*, 30 F.3d at 160. While the institutional injury in *Raines* was "wholly abstract and widely dispersed", *Raines*, 521 U.S. at 829, Congressman Schaffer's injury is concrete and personal. Congressman Schaffer's "political career and livelihood is precisely the type of individualized, concrete injury that the Supreme Court found lacking in *Raines*." *Miller v. Moore*, 169 F. 3d 1119, 1123 (8th Cir. 1999).

Raines did not address, let alone supersede, the situation of the individualized harms presented here, in *Meese*, and in *Boehner*. The Tenth Circuit's reliance on *Raines* as its authority for rejecting *Boehner* and ignoring *Meese* is not only improper, it puts the holding of the Tenth Circuit in conflict with the decisions of this Court and the D.C. Circuit.

III. Certiorari Should Be Granted Because Congressman Schaffer's Injury Can Be Redressed By A Judgment Against The Secretary Of The Treasury.

The Secretary asserts that a judgment against the Secretary would not redress Congressman Schaffer's injury. *Resp. Opp. at 15*. This assertion is not true. Section 80 Title 2 provides:

> The moneys which have been, or may be, appropriated for the compensation and mileage of Members and Delegates shall be paid at the Treasury . . .

The Secretary's argument, that he has no role in the payment of Congressman Schaffer's salary, is completely false. *Resp. Opp. at 15*. Based on the plain meaning of the word "paid", it is clear that the Secretary has the ultimate authority over the payment to Congressman Schaffer. Furthermore, because the Secretary also has a duty to ensure against "fraud" or "loss" (31 U.S.C. § 321(a)(5)), he is the final arbiter as to whether Congressman Schaffer's check is properly drawn, that is, in compliance with the Constitution and federal law. An injunction, enjoining the Secretary from cashing paychecks that are drawn in conflict with the Twenty-Seventh Amendment will indeed

address Congressman Schaffer's injury. The Secretary's argument that the Secretary could do nothing to alleviate Congressman Schaffer's injury, if so ordered by a federal court, is untrue.

CONCLUSION

For these reasons, *certiorari* should be granted.

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